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"WE THE JURISTS": ISLAMIC CONSTITUTIONALISM IN IRAQ

Intisar A. Rabb*

INTRODUCTION

The Iraqi Constitution's designation of Islamic law as "a source of law" placed the issue of Islamic law's role in new democracies at the forefront of the debates on "Islamic constitutionalism."¹ Although the meaning of this latter phrase is itself open to debate, at a mini-

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¹ The constitutions of twenty-five member countries of the Organization of the Islamic Conference (OIC) incorporate some form of Islamic law: Afghanistan, Algeria, Bahrain, Bangladesh, Brunei, the Comoros Islands, Egypt, Iran, Jordan, Kuwait, Libya, Malaysia, the Maldives, Morocco, Oman, Pakistan, Palestine (transitional law), Qatar, Somalia, the Sudan, Syria, Tunisia, the United Arab Emirates, Yemen, and formerly, Iraq. For the full list of OIC countries, see the OIC official website, http://www.oic-oci.org/oicnew/member_states.asp (last visited Feb. 22, 2008). Saudi Arabia may be counted as the twenty-sixth, although it has no formal constitution; its functional equivalent is a basic law that specifies the *Qur'ān* as its constitution and *sharī'a* as its law. In addition, five OIC-member states permit courts to apply Islamic law in matters of personal status: the Gambia, Indonesia, Lebanon, Nigeria, and Senegal. Several non-OIC, non-Islamic constitutional states also convene *sharī'a* courts or permit their courts to apply Islamic personal status laws for their Muslim minority populations, for example, Ethiopia, Ghana, India, Israel, Kenya, the Philippines, Singapore, Sri Lanka, Tanzania, and in some cases, Western countries like the United States. See, e.g., Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in WOMEN'S RIGHTS & ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 177, 188–211 (Lynn Welchman ed., 2004) (describing the application of Islamic law to marriage and divorce proceedings in the United States and discussing its enforceability in court).

imum it refers to a modern governing structure of limited powers in which a written constitution designates Islamic law as a source of law.²

More than two years after its ratification, there has been little to no headway toward detailing the mechanisms to be employed for fleshing out Iraq's constitutional skeleton. To be sure, functioning political processes require domestic security—which has been lacking—before the government can turn to constitutional rule-of-law questions under a state of non-emergency. But after security, constitutional and rule-of-law issues are the next big questions facing Iraq. A central component of these questions concerns the role of Islamic law.

Existing debates over the viability of Islamic constitutionalism question whether a democratic state that constitutionally draws upon Islamic law is possible, particularly when liberal democratic and human rights norms are juxtaposed against uncompromising formulations of archaic rules of Islamic law.³ Such juxtapositions are unhelpful. A conception of Islamic law as a monolithic body of religio-ethical rules removed from the legal interpretive process precludes a discussion of the real issues at stake in Islamic constitutionalism⁴:

2 Constitutional law scholars differ on the definition of "constitutionalism" as much as they differ on the precise definition of a constitution or of democracy. Without entering these debates, this definition of Islamic constitutionalism draws on basic conceptions of "constitution" and couples them with Islamic law incorporation.

3 See, e.g., Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 NW. U. J. INT'L HUM. RTS. 4, ¶ 2 (2005), available at <http://www.law.northwestern.edu/journals/jihr/v3/4/travis.pdf> (arguing that Islamic constitutionalism is inherently undemocratic and that by incorporating Islamic law into their constitutions, Iraq and Afghanistan "may become enduring and universally recognized Islamic fundamentalist states" that will violate women's rights and end driving privileges in particular).

4 The earliest treatments of Islamic law in Western literature, such as those by I. Goldziher (in the 1880s and 1890s), G.H. Bousquet (in the 1940s), and J. Schacht (in the 1950s), define Islamic law as sacred ritual law different from the definition of law in the sense of Western positive law. See, e.g., BABER JOHANSEN, *Muslim Fiqh as a Sacred Law: Religion, Law and Ethics in a Normative System*, in CONTINGENCY IN A SACRED LAW: LEGAL AND ETHICAL NORMS IN THE MUSLIM FIQH 1, 44–56 (1999). Max Weber adopted those views in his analysis of Islamic law as "procedurally irrational" religious law, which is largely homogenous, has no practical relevance outside of liturgical acts and personal status, and which therefore does not constitute a proper subject for comparison to Western legal systems. *Id.* at 48–51. More recently, scholars of Islamic law in the humanities, drawing on primary Islamic legal sources, have revised this view as they discover complexities in Islamic law and jurisprudence. Developments in the legal academy in comparative legal scholarship have been slower; Weber's formulation persists likely because of the heretofore inaccessibility of many primary sources for Islamic law and the dearth of studies that draw upon them in the secondary literature. For a thoughtful treatment of comparative legal studies that attempts to move beyond Weberian categories for Islamic and other non-Western legal systems, see generally H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (2004). For a critique of "ahistoricist jurisprudence" of Islamic law that conceives

modes of legitimate and authoritative interpretation and possibilities for laws that forward rule-of-law values and that can resolve potential tensions between democratic and religious accomodation concerns.

More specifically, the central questions that Islamic constitutionalism evokes in the context of lawmaking and adjudication concern how to interpret Islamic legal texts within the particular governmental arrangement outlined by the constitution and executed by institutional actors. In other words, how is law determined in light of both structural considerations (which institutional bodies legitimately legislate or adjudicate) and methodological ones (which legal processes can legislators and adjudicators legitimately employ)?⁵ What does the incorporation of Islamic law into the constitutional scheme add to that dynamic? In addressing these questions with respect to Iraq's emerging form of Islamic constitutionalism, this Article will consider the role of Islamic law as it relates to popular sovereignty ("We the People") and juristic input ("We the Jurists")⁶ in the legal process. It does so with respect to Islamic theories of governance and in comparative constitutional perspective by analyzing how existing constitutional states have negotiated interpretive processes under the aegis of Islamic constitutionalism.

This Article proceeds in four Parts, each examining one of four central questions concerning Islamic law's role in governmental and

of the law as a monolith detached from historical circumstances, see Anver M. Emon, *The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law*, 4-5, 35-36 & n.10 (N.Y. Law Sch. Islamic Law & Law of Muslim World, Working Paper No. 08-09, n.d.), available at <http://www.ssrn.com/paper=1086767>.

- 5 By legitimacy or validity, I refer to the legal positivist's "rule of recognition" as articulated by H.L.A. Hart, for the notion of the legal sources and process of interpretation that participants and actors in any legal regime recognize as authoritative and valid, and therefore legitimate. See H.L.A. HART, *THE CONCEPT OF LAW*, 100-10 (2d ed. 1994).
- 6 Throughout this Article, I use "jurist" to refer to an expert of Islamic law who has completed a program of legal training through which he or she gains the authority to interpret Islamic legal sources and issue legal opinions. Historically, jurists derived authority not through state appointments, but through legal acumen as recognized in scholarly circles as well as amongst the populace who follow their edicts. Juristic formulations of the law issue through formal judicial decisions, extra-judicial legal opinions, and expositions of the law in legal treatises. Without delving into the various differences between types and ranks of jurists, my usage of the term encompasses scholars who fall under several headings in Arabic-Islamic legal terminology: *faqīh* (legal specialist, also jurist), *ʿālim* (scholar), *muftī* (jurisconsult), *uṣūlī* or *mujtahid* (jurist or jurisprudential specialist), or *marjaʿ* (exemplar). Historically, any one of these individuals, or perhaps a lesser-ranked "lawyer," could serve as a state-appointed judge (*qāḍī*), who typically consulted with a jurist (if he was not himself a skilled jurist) on difficult questions of law. For different rankings of jurists, see Wael B. Hallaq, *AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW* 1-23 (2001).

legal processes in an Islamic constitutional regime: (1) How much consideration does the constitutional text afford Islamic law? (scope of Islamic legal consideration); (2) What is the content of Islamic law? (nature and substance of Islamic law); (3) Who decides? (institutional decision-makers); and (4) How? (case study of recent Moroccan Islamic family law reforms).

Thus, Part I examines the text of the new Iraqi Constitution, describing the way in which it incorporates Islamic law, human rights, and democratic norms. To better understand the form of Islamic law-incorporation specific to Iraq, I compare the Islamic law provisions of the country's new Constitution (ratified in 2005) to its Transitional one, as well as to other incorporations of Islamic law in other countries in the region. This survey reveals that the constitutional drafters reinstated a type of Islamic constitutionalism that centers on Islamic law even as they left many issues of interpretation and institutional arrangement open.

Part II discusses the nature and substance of the Islamic law that the Constitution seeks to incorporate into its legal scheme. I begin with a description of the historical development of Islamic law, together with a discussion of its foundational sources and the interpretive processes jurists use to derive substantive law. I then apply that general understanding to the form that Islamic law adopts in modern state-institutional contexts, each of which involves questions of whether and how Islamic law is codified. In that regard, I review the heated debate in Iraq that arose regarding whether to keep Islamic family law codified (as in pre-Saddam Iraq) or to replace it with uncodified laws (in line with a proposal from post-Saddam Iraq).

Part III examines theoretical and descriptive models of Islamic constitutionalism in order to assess the roles that jurists can or do play in the legal process around issues of interpretation. Arguably, jurists—as the historical interpreters of Islamic law—act as a Fourth Branch⁷ to traditional government's three branches, particularly where the latter permits jurists to play a formal institutional role. In the process of negotiating the relationship between the two, it is here that tensions between modern liberal democratic sensibilities and traditional Islamic legal norms may play out. In the interpretive

⁷ Note that this conception of the "Fourth Branch" does not suggest a formal branch of government. Rather, the reference is to a non-government entity that influences the constitutionally defined legislative, executive, and judicial branches. In America, the Fourth Branch has been used foremost to refer to the media.

process, who makes the ultimate decision: “We the People” or “We the Jurists”?

Analyzing existing practices, I distinguish between three different types of constitutionalization of Islamic law: *dominant constitutionalization*—where a constitution explicitly incorporates Islamic law as the supreme law of the land; *delegate constitutionalization*—where a constitution incorporates Islamic law but delegates its articulation to the jurists; and *coordinate constitutionalization*—where a constitution incorporates Islamic law, laws of democratic processes, and liberal norms, placing them all on equal footing. Iran is an example of the first, where jurists effectively control the government and all interpretive legal decisions; Gulf Arab states are an example of the second, where interpretive authority over Islamic family law in particular is vested in the juristic classes; and Egypt and Morocco are examples of the third, where the government and interpretive decision makers have devised schemes of differing relationships with the jurists. I conclude with the observation that coordinate constitutionalization appears both to be the closest fit to Iraq’s skeletal constitutional scheme and to have the best institutional potential for yielding positive legal outcomes in that context.

Part IV examines with more detail how interpretation occurs in a system of coordinate constitutionalization through the lens of recent Moroccan reforms to Islamic family law. Arguably, Morocco presents a useful model for conceptualizing legislative debates that will no doubt arise in Iraq because, descriptively, both systems fall under the rubric of coordinate Islamic constitutionalization; the juristic classes who make up the “Fourth Branch” are strong in both systems; and normatively, the Moroccan reforms have been lauded domestically and internationally as a successful, self-conscious attempt to harmonize Islamic law with democratic and human rights norms.

* * *

Before proceeding to the main body of this Article, it is worth explaining the focus on family law in the case studies herein. Oddly enough, discussions of Islamic law and constitutionalism often revolve around questions of personal status. This focus is odd for students of American law because in the American context, family law is marginal to constitutional legal theory unless it invokes significant

questions of privacy rights.⁸ It is also odd for students of Islamic law, because while family law fills a major chapter in classical treatises on Islamic law, it has not been considered “constitutional” in the sense of forming one of the issues central to Islamic legal theory.

Yet, the centrality of family law in modern discussions of Islamic constitutionalism has an historical explanation. With the rise of the independent nation-state in the Muslim world, in many countries an Islamic legal order was replaced by hybrid legal systems: mixtures of French or British codes,⁹ classical Islamic substantive law,¹⁰ and tradi-

8 The most prominent examples of this are the debates over reproductive rights, sodomy laws, civil unions, and gay marriages. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (invoking liberty and privacy interests as a basis for invalidating the Texas Homosexual Conduct Act); *id.* at 579 (O'Connor, J., concurring) (applying an equal protection analysis); *Roe v. Wade*, 410 U.S. 113, 152–54 (1973) (recognizing a constitutional privacy interest in a woman's qualified right to terminate her pregnancy); see also William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (2004) (describing *Lawrence* as limited judicial activism that referees the divisive debate over identity politics). For an informative comparison of privacy in American and Islamic law, see generally Seema Saifee, *Penumbras, Privacy and the Death of Morals-Based Legislation: Comparing U.S. Constitutional Law with the Inherent Right of Privacy in Islamic Jurisprudence*, 27 FORDHAM J. INT'L L. 370 (2003).

9 In line with their former colonial powers, most Arab countries adopted French codes, and Asian countries like Pakistan and Indonesia drew upon British codes. The seat of the Ottoman Empire (present-day Turkey), which was not colonized, drew upon Swiss codes. The history of colonialism and power differentials raise the question whether the resulting hybrid systems were externally imposed or freely adopted—an issue that resonates with the situation in present-day Iraq. See *infra* notes 71–73 and accompanying text. Constitutional scholars focusing on the Middle East have argued that the answer is somewhere between the two. In their view, legal reformers from the Muslim world exercised legal agency in an attempt to preserve parts of Islamic law in the face of the inevitable dominance of Western codes accompanying domestic and transnational demands for legal adaptation in the colonial and post-colonial periods. E.g., NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* (1997). For example, Egyptian lawyer 'Abd al-Razzāq al-Sanhūrī, who was trained in France and Egypt, was instrumental to the codification endeavor for the Arab world; he formulated hybrid codes for Egypt, Iraq, and Kuwait. *Id.* at 149–50. For his views on comparative law and the new civil codes, see generally 'ABD AL-RAZZAQ AL-SANHURI, MAṢĀDIR AL-ḤAQQ FĪ AL-FIQH AL-ISLĀMĪ: DIRĀSA MUQĀRANA BI-AL-FIQH AL-GHARBI [SOURCES OF [CONTRACTUAL] RIGHTS IN ISLAMIC LAW: A COMPARATIVE STUDY WITH WESTERN LAW] (1954); 'ABD AL-RAZZAQ AL-SANHURI, WAJIZ FĪ SHARḤ AL-QĀNŪN AL-MADANĪ [ABRIDGED COMMENTARY ON THE CIVIL CODE] (1964); see also Enid Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895–1971*, 3 ARAB L.Q. 33 (1988) (describing Sanhūrī's Islamic and comparative law research and the civil codes he created using that knowledge).

10 Some scholars have suggested that Islamic law in hybrid form has spelled the death of Islamic law generally. See, e.g., Lama Abu-Odeh, *The Politics of (Mis)Recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 790 (2004) (arguing that Islamic law cannot be a “foundational category for anyone attempting to understand law in the Islamic world” because it has been supplanted by hybrid laws); Wael B. Hallaq, *Can the Shari'a be Restored?*, in ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 21, 21–48

tional customary law. In these countries, foreign codes usually replaced all aspects of civil and criminal laws *except* family law, which provided a home for Islamic and customary laws.¹¹ Notably, this type of hybridity was not a ubiquitous phenomenon in the Muslim world; nor was Islamic law always cabined in a family law shelter.¹² As such, it would be a mistake to *limit* analyses of Islamic constitutionalism to family law. To do so would leave us ill-equipped to deal with Islamic

(Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., 2004) (discussing Islamic law as a dead legal tradition with the advent of codification and colonial forms of education). This view reflects a formalistic definition of Islamic law in its developed classical iterations. In point of fact, aside from Islamic law's resurgence among Islamists and in modern constitutions, jurists continue to articulate the Islamic laws of private affairs (such as contracts and financial instruments, personal status, and ritual laws) in non-state forums, and adherents continue to consult them. This arrangement is not a radical departure from historical practices, where jurists typically operated independently and separately from the state. Moreover, Islamic legal-educational institutions through which Islamic law was perpetuated gained state support only well into the third or fourth century of Islam's advent. To be sure, the colonial period did little to bolster Islamic law as the dominating legal order of the Middle East; but it is unclear that it was the culprit for all decline. Already in the fourteenth century, for example, historian and sociologist Ibn Khaldūn commented on what he viewed as jurists' conservative and non-modern view of the world, along with a general decline of Muslim scholarship. *See generally* IBN KHALDŪN, MUQADDIMA (N.J. Dawood ed. & Franz Rosenthal trans., 1967). By the eighteenth century, scholars like Shāh Walī Allāh al-Dihlawī were advocating the renewal of the Islamic legal interpretive process (*ijtihād*) through the revival of Islam's intellectual and educational systems. *See* SHĀH WALI ALLĀH AL-DIHLAWI, ḤUJJAT ALLĀH AL-BĀLIGHA, *translated in* THE CONCLUSIVE ARGUMENT FROM GOD: SHĀH WALI ALLĀH OF DELHI'S ḤUJJAT ALLĀH AL-BĀLIGHA (Marcia Kristina Hermansen trans., 1996). In any case, declaring Islamic law non-existent in the modern period is unhelpful as it precludes an analysis of the continued practice of Islamic law privately and in state formations, of Islamic legal elements that appear so prominently in hybrid systems, and of legal issues central to discussions of Islamic constitutionalism.

- 11 For a description of how and why family law remained under the purview of Islamic law, see generally Hallaq, *supra* note 10, at 25.
- 12 For example, Saudi Arabia and Iran purport to rely on Islamic law as a main or exclusive source of law generally. The Maldives recently reformed its criminal code based on Islamic law; additionally, Northern Nigerian states have also instituted forms of an Islamic criminal code. Islamic law has been continuously practiced in areas of ritual, in some aspects of family law, and in commercial transactions in Muslim and non-Muslim countries alike. Islamic law is also said to fuel the Islamic finance industry, which has grown to be a near-trillion dollar industry with operations in over seventy countries, practices in major law firms like King & Spalding, financial products in major banks like HSBC, and mortgage companies like Guidance International devoted to "*shari'a*-compliant" offerings. *See, e.g.*, IBRAHIM WARDE, ISLAMIC FINANCE IN THE GLOBAL ECONOMY 1, 6 (2000) (noting that the new Islamic finance industry comprises several banks, mortgage companies, mutual funds, securities firms, and insurance companies). *But see* MAHMOUD A. EL-GAMAL, ISLAMIC FINANCE: LAW, ECONOMICS, AND PRACTICE, at xi-xii (2006) (arguing that current "Islamic finance" practices merely replicate conventional financial practices using pre-modern forms of "Islamic" contracts and in doing so, exist mainly as a form of rent-seeking legal arbitrage that diverge from the objectives of Islamic law).

law in other contexts and would ignore the central questions of Islamic constitutionalism that touch all spheres of law: matters of interpretation vis-à-vis institutional democratic structures. The focus on family law here is functional; through it, I attempt to engage in a meaningful comparative study of Islamic constitutional polities where Islamic family law represents a common denominator to assess Islamic legal elements in the civil codes of Iraq and elsewhere.

* * *

I conclude that, while Iraq will chart its own path, some conceptual and practical frameworks—including the Moroccan experience with “coordinate constitutionalism”—can perhaps be instructive with respect to considering difficult questions raised by Islamic constitutionalism in general and how they might be resolved in Iraq in particular. In effect, the conceptual proposals in theory, and Morocco’s family law reforms in practice, provide examples of modes through which “We the People” and “We the Jurists” coordinate in the legal interpretive sphere for the rule of law in a constitutional scheme of limited government that incorporates Islamic law without allowing static or anti-democratic notions of that law to dominate.

I. CONSTITUTIONAL INCORPORATION OF ISLAMIC LAW

The Iraqi Constitution establishes a governing structure wherein Islamic law, democracy, and human rights norms all play a role. This Part begins by outlining each type of clause. Then, in contemplating the scope of legal consideration afforded Islamic law in particular, I offer a textual, historical, and comparative analysis of the Islamic law clauses. The textual analysis examines the possible import of the unique words employed in the constitutional text. The historical analysis highlights the differences between the current Iraqi Constitution and its predecessor—Iraq’s Transitional Administrative Law. The comparative analysis situates this Constitution against analogous clauses from other Islamic constitutions. Together, these Parts demonstrate that the Iraqi Constitution’s text incorporates Islamic law but leaves the details unresolved and awaiting further legislation.

A. Textual Structure and Technical Terminology

Three separate types of provisions govern the status of religion and Islamic law in the 2005 Iraqi Constitution, which establishes itself as the supreme law of the land.¹³ One set of provisions governs the role of religion and Islamic law directly. A second set specifies certain rights and freedoms due to every Iraqi citizen. A third set establishes the democratic nature of the new regime. The main relevant clauses read as follows:

*Religion and Islamic Law*¹⁴:

Article 2.1. Islam is the official religion of the state and a basic source of legislation. No law can be passed that contradicts Islam's settled [legal] rules [or settled Islamic (legal) rules] (*thawābit aḥkām al-Islām*).

*Rights and Freedoms*¹⁵:

Article 2.1(c). No law can be passed that contradicts the rights and basic freedoms outlined in this constitution.

Article 14. Iraqis are equal before the law without discrimination on the basis of gender, ethnicity, nationality, origin, color, religion, sect or legal school (*madhhab*), belief, opinion, or social and economic status.

13 2005 Al-Dustūr al-'Irāqī [Constitution] art. 13 (Iraq) ("This Constitution shall be the supreme and highest law in Iraq. . . . No law that contradicts this Constitution shall be passed."). The Constitution is in Arabic; the translations are my own.

14 *Id.* art. 2.1; see also *id.* art. 10, 29(a). In addition to Article 2.1, other provisions that commit the state to protecting religious sites and values include Article 10 (stipulating that the "holy shrines and religious sites in Iraq are religious and cultural entities . . . [that] the state is committed to maintain and protect . . . [while] ensur[ing] the practice of religious rights freely within them") and Article 29(a) (noting that the state will preserve the centrality of the family as a "religious" value).

15 Like the United States, Iraq's "Bill of Rights" is spread over several constitutional provisions. For an overview, see the following provisions: Article 2.2 (religious freedom), Articles 14 and 16 (equal protection), Article 15 (right to life), Article 17.I (privacy), Article 20 (political participation), Article 37 (personal freedom and dignity), Article 41 (freedom of religion), Article 42 (freedom of belief), and Article 44 (provisions of international human rights treaties to which Iraq is a signatory so long as they do not conflict with the Constitution). Other scattered rights-provisions include Article 22.1 (work for all that guarantees a good life), Article 29.4 (non-violence), Article 30 (social and health insurance), and Article 34.2 (free education). Finally, Article 2.1(c) sets forth a non-contradiction clause for constitutional rights generally.

*Democratic Process and Rule of Law*¹⁶:

Article 2.1(b). No law can be passed that contradicts the principles of democracy.

Article 5. The law is sovereign and the people are the sources of power and its legitimacy.

* * *

Read together, the two clauses on “Islam” and “settled Islamic (legal) rules” in Article 2 incorporate Islamic law rather than Islam itself. The constitutional text indicates that this is the case in two ways—through one negative implication and one positive one. First, “Islam” is too vague a notion to serve as a source of legislation because the term connotes a vast religious tradition with a considerable amount of internal diversity.¹⁷ As a religion, Islam refers to a belief system that in its simplest form entails three core tenets—belief in

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- 16 Several democratic procedural norms outline certain institutional structures, provisions for popular sovereignty, and federalism-limiting principles (an especially central and controversial issue in the new Iraq). Provisions establishing institutional structures and norms include the following: separation of powers (Article 47), an independent judiciary and independent judges (Article 19 and Article 88), and a bar on private or exceptional courts (Article 95). Popular sovereignty provisions include a non-contradiction clause for the “principles of democracy” (Article 2.1(b)), that the rule of law extends from “the People” (Article 5), and that laws and judicial rulings will issue in the name of “the People” (Article 128). A federalism clause states that regional constitutions cannot contradict the Federal Constitution (Article 120).
- 17 Muslim jurists tended to adopt a nomocentric view of religion, detailing legal and advisory-ethical rules for all manner of factual and legal topics in their attempts to reduce abstract moral precepts and divine commands to concrete rules in a public setting requiring order and rule of law. See, e.g., Roy Parviz Mottahedeh, *Introduction to MUHAMMAD BĀQIR AŞ-ŞADR, DURŪS FI ‘ILM AL-UŞŪL [LESSONS IN ISLAMIC JURISPRUDENCE]* 19 (Roy Parviz Mottahedeh trans., 2003) (describing how the Mu‘tazilite tradition associated with Basran ‘Abū l-Hudhayl divided religious edicts into two categories: those determinable by intellect, and those determinable only by revelation); see also BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 145–71 (1998) (examining Islamic law’s multiple ethico-legal injunctions and its moralistic bent). To be sure, Islamic legal theory distinguished between issues of law, which were proper subjects for juristic expositions, and issues of fact, which were not. But in practice, the lines between the two were often blurred. See Sherman A. Jackson, *Shari‘ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular Rule, and Pluralism*, 27 FORDHAM INT’L L.J. 88, 94–101 & nn.21–23 (2004) (citing IBN AL-QAŞŞĀR, *AL-MUQADDIMA FI UŞŪL AL-FIQH [INTRODUCTION TO LEGAL THEORY]* (Beirut: Dār al-Gharb al-Islāmī 1996); SHIHĀB AL-DĪN AL-QARĀFĪ, *1 AL-FURŪQ, ANWĀR AL-BURŪQ FI ANWĀ’ AL-FURŪQ* 11 (Beirut: ‘Ālam al-Kitāb n.d.)); cf. ABDOLKARIM SOROUSH, *REASON, FREEDOM, AND DEMOCRACY IN ISLAM: ESSENTIAL WRITINGS OF ABDOLKARIM SOROUSH* 133–34 (Mahmoud Sadri & Ahmad Sadri trans., 2000) (critiquing expansive legalistic notions of Islam and juristic failures to harmonize religious concerns with justice and law’s particularistic rules, and noting therefore that “religious law [*shari‘ah*] is not synonymous with the entirety of religion” (alteration in original)).

God, belief in the Prophet, and belief in the day of resurrection¹⁸—and encourages the establishment of a just order.¹⁹

The religion can therefore provide little legislative guidance, unless the Constitution contemplates legislative regulations on belief. It does not. The Constitution provides for freedom of religion and belief in both inter- and intra-religious terms. Perhaps foreshadowing the sectarian strife that now threatens the very viability of the Iraqi state, the Constitution prohibits discrimination on the basis of religion or belief with respect to the many factions into which Iraqis may divide: religious, sectarian, or with regard to legal school (*madhhab*), belief, or opinion.²⁰ It further prohibits groups and even *tendencies* that advocate accusing Muslims of infidelity to the faith.²¹ The negative implication is that Islamic law, rather than Islam, is what the Constitution invokes as a basis for legislation.

18 All mainstream Islamic sects, both Sunnī and Shī'ī, agree on these tenets, though they differ significantly in other ways theologically. See, e.g., ABŪ ḤAMID AL-GHAZĀLĪ, *FAYṢAL AL-TAFRIQA BAYNA AL-ISLĀM WA AL-ZANDAQA* [THE DECISIVE CRITERION FOR DISTINGUISHING ISLAM FROM MASKED INFIDELITY] (1901), translated in ON THE BOUNDARIES OF THEOLOGICAL TOLERANCE IN ISLAM: ABŪ ḤAMID AL-GHAZĀLĪ'S *Fayṣal al-tafrīqa Bayna al-Islām wa al-Zandaqa* 85 (Sherman A. Jackson trans., 2002); MUḤAMMAD BĀQIR AL-ṢADR, *AL-MŪJAZ FĪ UṢŪL AL-DĪN: AL-MURSIL, AL-RASŪL, AL-RISĀLA* [ABRIDGEMENT OF THEOLOGICAL PRINCIPLES: GOD, THE MESSENGER, THE MESSAGE] ('Abd al-Jabbār al-Rifā'i ed. 2000).

19 See, e.g., QUR'ĀN 16:90 (commanding justice, good works, and avoidance of evil deeds); *id.* 4:135 (commanding believers to stand up for justice, even if it be against their own selves and families); *id.* 5:8 (similar); *id.* 7:29 (stating that God commands justice); *id.* 57:25 (reflecting on how messengers were sent to instruct humans to establish justice).

20 2005 *Al-Dustūr al-'Irāqī* [Constitution] art. 14 (Iraq) ("Iraqis are equal before the law without discrimination on the basis of sex, ethnicity, nationality, origin, color, religion, sect, belief, opinion, or social and economic status."); *id.* art. 42 ("Every individual has the freedom of conscience and belief."); *id.* art. 43 ("The followers of every religion and sect are free in the practice of their religious rites, including [Shī'ī] Ḥusayniyya rites [and] the administration of religious endowments and associated affairs as well as religious institutions The state guarantees freedom of worship and the protection of [holy] sites.").

21 *Id.* art. 7 ("Entities or trends that advocate, instigate, justify or propagate racism, terrorism, *takfīr* (declaring a Muslim to be an unbeliever or apostate), [or] sectarian cleansing, are banned . . ."). As recent trends of bloodshed have shown, the specter of sectarian vigilantism makes the practice of *takfīr* especially dangerous amongst "Wahhābīs" or "neo-salafīs" in the mold of Ayman al-Zawahiri or Osama bin Laden, who believe that apostasy—and the permissibility or even obligation of death for apostates—results from numerous mundane activities that were historically acceptable in mainstream Islamic tradition. See, for example, the list of ten acts by which a person can be considered a disbeliever first announced by Muḥammad b. 'Abd al-Wahhāb (eponym of the Wahhābī school) in the late-eighteenth century and updated by one of the foremost thinkers of Salafī-Wahhābī thought in the late-twentieth century, the late 'ABD AL-'AZĪZ IBN BĀZ, *MIN FATĀWĀ WA-RASĀ'IL IBN BĀZ* [THE LEGAL RULINGS AND OTHER TRACTS BY IBN BĀZ] 2, 102–05 (1988), translated in *DEFINING ISLAM: A CRITICAL READER* § 1 (Andrew Rippin ed., 2007).

Second, and more pointedly, is the positive implication of the non-contradiction clause in its use of two terms that connote law: “*thawābit*” and “*aḥkām*.” *Thawābit* (singular *thābit*) is discussed in classical works, but does not play a rule of central importance in articulations of legal theory. With its appearance in modern documents of law and state, contemporary jurists have revisited the term, attempting to link it to the classical tradition. For example, the head mufti of Egypt, ‘Alī Jumu’a, explains that *thawābit* are agreed-upon Islamic legal rules that apply to all Muslims, regardless of time or place.²² *Aḥkām* typically refers to legal rules in both classical and modern usage.²³ Together, these two terms affirmatively indicate that the Iraqi Constitution has incorporated Islamic law—rather than the religion of Islam.

22 Jumu’a compares *thawābit* to the classical category of unchanging rules that enjoy legal consensus (*al-mujma’ ‘alayh*), which include personal status laws. ‘Alī Jumu’a, *Al-Thābit wa-l-Mutaghayyir fī al-Sharī’a al-Islāmiyya* [*The Permanent and Impermanent in Islamic Law*], 7 AL-MANĀR AL-JADĪD [NEW MINARET] 45–46 (1999). His discussion has been artfully discussed by Kristen A. Stilt in *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT’L L. REV. 695, 744 (2004). She notes that, contrary to Jumu’a’s opinion, “[t]here is no clear sense in Islamic jurisprudence that the *thawābit* refer to a fixed and widely known list of rules or principles . . .” *Id.* at 744. Indeed, Muḥammad Bāqir al-Ṣadr explicitly notes that even “Islamic legal rules . . . [that are] *thābit* (settled) can change in application, depending on contingencies that may change from time to time.” MUḤAMMAD BĀQIR AL-ṢADR, AL-FATĀWĀ AL-WĀḌĪHAH WAQĀN LI-MADHHAB AHL AL-BAYT [CLEAR LEGAL OPINIONS ACCORDING TO SHI’I LAW] 13 (1977).

23 Descriptively, “*ḥukm*” (the singular of *aḥkām*) refers to the logical relationship between two objects, see I MUḤAMMAD ‘ALĪ AL-TAHĀNĀWĪ, KASHSHĀF ISTILĀḤĀT AL-FUNŪN WA AL-‘ULŪM 693–95, 700 (Beirut 1996), but prescriptively, it is a theological/legal rule that results from a command, *id.*; see also MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 140–43 (rev. ed. 1991) (explaining how rules develop from religious commands). Jurisprudence adopts logic’s descriptive sense when describing the obligations or status relationships that result from certain legal acts (*aḥkām waḍ’iyya* [declaratory rulings]), like the validity of a contract; it adopts theology’s prescriptive sense when considering the implications of divine commands for human obligations (*aḥkām taklīfiyya* [injunctive rulings]), like the obligation to pay a poor-tax on wealth. Jurists define it as follows: a *ḥukm* is a legal rule regulating human behavior as a consequence of a divine command. See WAHBA AL-ZUHAYLI, *Al-Wasīṭ fī uṣūl al-fiqh al-islāmī* [*Compendium on Islamic Jurisprudence*] 34 & n.1 (1965) (defining *ḥukm* as “God’s divine-law articulation associated with the actions of legal-agents” and citing an identical definition in the works of several jurisprudential specialists). In judicial institutions—both classical and modern—a *ḥukm* is a legally binding court judgment, which is distinguished from the opinions (*fatwās*) issued by *mufīṣ* that have only advisory force. See SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHĀB AL-DĪN AL-QARĀFĪ 116, 148 (1996) (clarifying the prescriptive nature of a *ḥukm* and explaining why only a *ḥukm* is binding).

B. In Historical Perspective

The import of the Islamic law clauses here were further considered in light of analogous clauses in Iraq's Transitional Constitution. The new Constitution differs from the Transitional one in two significant ways. First, the new Constitution replaced the clause stipulating that "Islam . . . is to be considered a source of legislation (*maṣḍar li-al-tashrī*)"²⁴ with the clause stipulating that "Islam . . . is a *basic* source of legislation (*maṣḍar asās li-al-tashrī*)."²⁵ Dropping the words "is considered" and adding "basic" may be taken to suggest that the drafters of the new Constitution aimed for Islamic law to have a more central role in the legislative process and in judicial determinations of constitutionality.

Second, the new Constitution replaces the old clause prohibiting laws that contradict "the agreed-upon (through consensus), settled tenets of Islam (*thawābit al-Islām al-mujma' 'alayhā*)"²⁶ with a clause against laws that contradict "settled Islamic (legal) rules."²⁷ The first change, replacing "settled tenets of Islam" with "settled Islamic (legal) rules," underscores the focus on law rather than religion. The second change omits "agreed-upon (through consensus)," the full implications of which are unclear. Consensus forms one of the sources for definitive Islamic legal opinions, but historically jurists have rarely agreed upon the details of legal rulings. In the absence of consensus, jurists were free to develop alternative interpretations according to their legal school's methodology for deriving legal rules. The product of this scheme was Islamic law's system of legal pluralism: multiple interpretations that were deemed equally valid, so long as they followed a valid juridical interpretive process based on authentic sources.²⁸ In this context, the phrase "agreed upon (through consensus)" may have closed the door on extensive juridical involvement in determining the content of Iraqi state law relevant to questions of Islamic law. For this phrase recalls terminology with established meaning and—within those confines—would have narrowed the juristic sphere of input to a short list of universally agreed-upon

24 Law of Administration for the State of Iraq for the Transitional Period [Constitution] art. 7, Mar. 8, 2004 [hereinafter Interim Constitution], available at <http://www.cpa-iraq.org/government/TAL.html> (last visited Dec. 15, 2006).

25 2005 Al-Dustūr al-'Irāqī [Constitution] art. 2.1 (Iraq) (emphasis added).

26 Interim Constitution, *supra* note 24, art. 7.

27 2005 Al-Dustūr al-'Irāqī [Constitution] art. 2.1 (Iraq).

28 See, e.g., JACKSON, *supra* note 23, at 142 (defining medieval jurist Shihāb al-Dīn al-Qarāfi's concept of the rule of law as "the ability to countenance a plurality of equally authoritative legal interpretations").

rules. The replacement of this phrase with a newer, more indeterminate term, "settled Islamic (legal) rules," could have the opposite effect, depending on (1) the meaning it ultimately assumes vis-à-vis the principle of consensus and (2) the relationship the state develops with the jurists. These issues are taken up in Parts II and III, respectively.

C. *In Comparative Perspective*

The scope of consideration for Islamic law can be evaluated by comparing Iraq's constitutional language with that of other Islamic constitutional countries. In the twenty-six countries that incorporate Islamic law,²⁹ the constitutions typically refer to "*sharī'a*." Most refer to the term "Islamic *sharī'a*" (Bahrain, Libya, Kuwait, Oman, Qatar, Saudi Arabia, Somalia, Sudan, the United Arab Emirates, and Yemen);³⁰ alternative terms include "Islamic *fiqh*" (Syria)³¹ and "the principles of Islamic *sharī'a*" (Egypt).³² Each of these formulations contrasts with Iraq's use of "Islam" and "settled Islamic (legal) rules."³³ In addition, Islamic constitutions generally incorporate Islamic law through rendering *sharī'a* and its cognates "a (main) source" or "the source of law."³⁴ Iraq renders Islamic law "a basic source."³⁵

29 See *supra* note 1. A minority of other constitutions use anomalous phrases that do not reference *sharī'a* directly. See, e.g., 2004 The Constitution of Afghanistan art. 35 ("the principles of the sacred religion of Islam"); 1980 Qānūn-i Asāsī-yi Jumhūrī-yi Islāmī-yi Irān [Basic Law of the Islamic Republic of Iran (as amended)] art. 4 ("Islamic criteria"); 1998 The Constitution of the Republic of the Maldives ch. 1 § I ("the principles of Islam"); 1973 The Constitution of the Islamic Republic of Pakistan Part IX § 227 ("Injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet"); ch. 3A § 203D(1) (same).

30 2002 Constitution of the Kingdom of Bahrain art. 2; 1962 Kuwait Constitution art. 2; 1992 Basic Law of Governance [Constitution] art. 7–8 (Saudi Arabia); 1969 Libya Constitution art. 8 (for inheritance); 1996 White Book: The Basic Law of the Sultanate of Oman [Constitution] art. 2; 2004 Transnational Federal Charter of the Somali Republic [Constitution] art. 8 (Somalia); 2005 Constitution of the Republic of Sudan art. 5.1; 2004 Permanent Constitution of the State of Qatar art. I; 1994 Constitution of the Republic of Yemen art. 3; 1996 United Arab Emirates Constitution art. 7; 1980 Qānūn-i Asāsī-yi Jumhūrī-yi Islāmī-yi Irān [Basic Law of the Islamic Republic of Iran (as amended)] art. 167 (Iran). For the full list of Islamic constitutional countries, see *supra* note 1.

31 1973 Syria Constitution art. 3.

32 1971 Constitution of the Arab Republic of Egypt art. 2.

33 2005 Al-Dustūr al-'Irāqī [Constitution] art. 2.1.

34 Bahrain, Saudi Arabia, Kuwait, Qatar, Syria, and the United Arab Emirates use "a main source," and Yemen and Sudan "a source;" Egypt Iran, and Somalia use "the (main) source" or the "basic source." See *supra* note 30.

35 2005 Al-Dustūr al-'Irāqī [Constitution] art. 2.1 (Iraq).

Iraq's unique terminology for "Islamic law" and its avoidance of the term *shari'a* likely signals that Iraq aims not to mimic any existing form of Islamic constitutionalism.³⁶ The precise form of Islamic constitutionalism that Iraq adopts will depend upon the form that its government gives to the term "Islam" and to "settled Islamic (legal) rules." Nevertheless, to the extent that all types of Islamic constitutionalization are characterized by a constitutional incorporation of Islamic law, the experiences of other Islamic constitutional countries in the realm of legislation and legal interpretation may prove instructive to understanding some of the issues facing Iraq.

II. NATURE AND SUBSTANCE OF ISLAMIC LAW

If Iraq's constitutional drafters aimed for Islamic law to play a central role in Iraqi legislation, what is the Islamic law (or "settled Islamic (legal) rules") that they incorporated? Determining the substance of Islamic law can be a complex process because of its developmental history and its internal diversity. After examining these themes to develop a general definition of Islamic law in historical perspective, this Part considers them under the modern rubric of Islamic constitutionalism. In this context, two important issues that face Iraq are questions dealing with consensus and codification. Despite the new Constitution's omission of an explicit reference to consensus, what role does consensus play, given its central place in Islamic jurisprudence? Does the phrase "settled Islamic (legal) rules" entail a consensus requirement after all? And in the modern legislative process, which will either codify laws or leave them open to juristic interpretation, what forms might Islamic law adopt in Iraq? I will discuss the latter question in light of recent Iraqi history, in which family law has been prominent in the codification debate even before Saddam's fall, and have continued to figure in with the advent of Islamic constitutionalism.

A. *In Historical Perspective*

Simply put, Islamic law is law that is either embodied in or derived from Islam's foundational legal sources.³⁷ There are two terms used

³⁶ It may also mean that Iraq's constitutional drafters deliberately recognized a difference between *shari'a* and *fiqh*. For this difference, see *infra* note 39 and accompanying text.

³⁷ The four principal sources of law for Sunnis include the Qur'an, Sunna (prophetic practice), Consensus, and Analogical Reasoning. See, e.g., KAMALI, *supra* note 23, at 16-116, 228-305; BERNARD WEISS, *THE SEARCH FOR GOD'S LAW* 151-258 (1992). For Shi'is, they

to refer to Islamic law: *sharī'a* and *fiqh*. *Fiqh* and *sharī'a* often are used interchangeably to refer to "Islamic law," both among modern and classical commentators. The recent trend, however, is to distinguish between the two.³⁸

Sharī'a is the divinely ordained "path," known perfectly only by God. In other words, it is God's will expressed in the ideals of perfect justice and equality. *Fiqh* (literally, "discernment") is a human attempt to know the *sharī'a*. The human articulation of the ideal is a dynamic process that must constantly be worked and reworked to address new situations.³⁹ Thus the law embodied in the revelatory sources is *sharī'a* proper—God's divine law articulated in principled terms. The law derived from the sources is *fiqh*—the human attempt to understand and articulate the ideal in terms of particular circumstances of individual and social life.

In sum, Islamic law refers to both the existing body of precendential substantive laws of *fiqh* and the processes through which jurists interpret or update the law in attempts to better approximate *sharī'a*.⁴⁰ This conception of Islamic law might be compared to the sense of "law" in American constitutional law and similar common law systems—a sometimes confusing collection of doctrines and rules, based on a foundational text, subject to clarification or refinement by qualified jurists endowed with the authority to say what the law is.⁴¹

are the Qur'ān, Sunna (normative prophetic and imamic practice), Consensus, and Reason. See HOSSEIN MODARRESSI, AN INTRODUCTION TO SHI'Ī LAW: A BIBLIOGRAPHICAL STUDY 2 (1984).

38 See ŞUBHÎ MAHMAŞÂNÎ, FALSAFAT AL-TASHRÎ' Fİ AL-ISLÂM [THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM] 21-24, 199-200 (Farhat Ziahddeh trans. 1961); WEISS, *supra* note 17, at 119-21; ABŪ ZAHRA, UŞŪL AL-FIQH 291 (Dār al-Fikr al-'Arabī 1957); Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 FORDHAM INT'L L.J. 4, 64 (2003).

39 Mottahedeh, *supra* note 17, at 17-18 (explaining the development of jurisprudence in Islamic law, which involves the human attempt to discern the Sharī'a, as the path ordained and known only by God); see also ABOU EL FADL, SPEAKING IN GOD'S NAME 32 (2001) ("The Sharī'ah is God's Will in an ideal and abstract fashion, but the *fiqh* is the product of the human attempt to understand God's Will. In this sense, the Sharī'ah is always fair, just and equitable, but the *fiqh* is only an attempt at reaching the ideals and purposes of Sharī'ah (*maqāṣid al-Sharī'ah*). According to the jurists, the purpose of Sharī'ah is to achieve the welfare of the people (*taḥqīq maṣāliḥ al-'ibād*), and the purpose of *fiqh* is to understand and implement the Sharī'ah. The conceptual distinction between Sharī'ah and *fiqh* was the product of a recognition of the inevitable failures of human efforts at understanding the purposes or intentions of God.").

40 For further discussion of substance and procedure in Islamic law, see Ann Elizabeth Mayer, *The Sharī'ah: A Methodology or a Body of Substantive Rules?*, in ISLAMIC LAW AND JURISPRUDENCE 177-98 (Nicholas Heer ed., 1990).

41 This view of the juridical role is similar to Chief Justice John Marshall's exposition of the judicial power "to say what the law is" in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Chibli Mallat makes this point with reference to the Iranian Constitution. See

Early jurists developed a system of jurisprudence to say what the law is—a hermeneutical methodology for assessing and interpreting texts in efforts to articulate *sharī'a* in terms of *fiqh*. One scholar has explained that “it is essential for the *fiqh* to be known on the human plane as accurately as possible.”⁴² Thus, engaging in jurisprudential methods to derive the law (*fiqh*) requires training in both jurisprudence and in substantive law.

The main features of jurisprudence used to mediate between authoritative texts (or *sharī'a*) and derived legal rules (*fiqh*) involve three stages. Jurists must identify and weigh plausible foundational sources of law, drawing on a vast body of Qur'ānic and *ḥadīth* texts as well as a vast body of precedential rulings from early jurists and community leaders. They must also determine the authenticity of those sources. While there is no doubt about the integrity and authenticity of the Qur'ānic text among jurists, there is considerable doubt as to the authenticity of many *ḥadīths* through which the Sunna is generally known.⁴³ Moreover, there is disagreement about the existence of consensus—the third authoritative source of law—on all but a few areas of law. There is also considerable diversity of equally authoritative precedential rulings. Finally, jurists must weigh these sources and precedents, attempting to arrive at a legal posture with respect to a particular issue at hand. They do so by navigating a vast body of rules from these multitudinous, sometimes divergent, sources with an eye to coherence.⁴⁴

CHIBLI MALLAT, THE RENEWAL OF ISLAMIC LAW: MUHAMMAD BAQER AS-ŠADR, NAJAF AND THE SHI'Ī INTERNATIONAL 79 (1993) (“[T]he quintessential constitutional question is who ultimately holds the power to say what the law is. In view of the centrality of the *sharī'a* in the definition of an Islamic state, this issue represents the essential problem of contemporary Islamic law.”).

42 Mottahedeh, *supra* note 17, at 17–18 (describing this jurisprudence (*uṣūl al-fiqh*) as a “method of explaining texts [that] gains authority as it gains internal consistency and agrees with theological ideas”). For a comparison with American ideas of legal interpretation, compare citations in *infra* note 44.

43 This doubt led to the emergence of the science of *ḥadīth*-criticism, which aimed to distinguish between authentic and inauthentic reports of Sunna. *E.g.*, IBN AL-ŠALĀH, 'ULŪM AL-ḤADĪTH (Nūr al-Dīn 'Iṭr ed., 1966). That science itself has been critiqued for failing to adequately weed out spurious *ḥadīths*. *See, e.g.*, Johnatha Brown, *Critical Rigor vs. Judicial Pragmatism: How Legal Theorists and Ḥadīth Scholars Approached the Backgrowth of Isnāds in the Genre 'Ilal al-Ḥadīth*, 14, I J. OF ISLAMIC LAW & SOC'Y 1 (2007).

44 It is in this sense that “law” here is like American constitutional interpretation. *See, e.g.*, William J. Brennan, Jr., *The Constitution in the United States: Contemporary Ratification*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 13–15 (Sanford Levinson & Steven Mailloux eds., 1988) (noting that Supreme Court interpretations gain legitimacy through presenting coherent arguments according to recognized rules of interpretation and that “[b]ecause judicial power resides in the authority to give meaning to the

The process is further complicated because of the pluralistic system of multiple legal schools. Over time the legal sources, the organizational scheme through which jurists attempted to arrange the sources into a coherent legal system, and thus the sources and methodologies for individual jurists' interpretive schemes all typically have come to be accessed through one of Islam's multiple legal schools. These schools by and large represent different means of negotiating the sources, as worked out by expert jurists over the centuries.

Islamic law proceeded in stages, and grew in complexity the further it moved from its origins. Originally, it consisted of Qur'ānic and prophetic commandments that drew upon, modified, or replaced existing legal conventions in the seventh-century Near East. Following Muḥammad's death, four successor caliphs articulated public law while a scholarly class, some of whom were Muḥammad's Companions, some of whom were his Family members, continued and built upon his teachings.⁴⁵ For the Sunnīs, this class perpetuated amongst Muḥammad's Companions, their successors, and their collective students; for the Shī'a, this class perpetuated through the Prophet's educated and pious family members (the Imāms) and their students.⁴⁶ Records from these sessions and the informed opinions that individual scholars issued added to the *ḥadīth* corpus and helped define early law.

This scholarly, early juristic activity continued throughout the reign of the first Umayyad dynasty (r. 661–750). During this time and

Constitution, the debate [about legitimacy] is really a debate about how to read the text, about constraints on what is legitimate interpretation"); Sanford Levinson, *Law as Literature*, in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER*, *supra*, at 155 (affirming that the judiciary must adhere to recognized rules of interpretation for legitimate interpretation, though noting that such rules are not uniform).

45 On the succession to Muḥammad as head of the Muslim community and the first four caliphs' leadership activities, see generally 1 MARSHALL G.S. HODGSON, *THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION* (1974) (standard Sunnī narrative); HUGH KENNEDY, *THE PROPHET AND THE AGE OF THE CALIPHATES* (1986) (same); WILFERD MADELUNG, *THE SUCCESSION TO MUḤAMMAD: A STUDY OF THE EARLY CALIPHATE* (1997) (alternative Shī'i account).

46 On the emergence and activities of the scholarly classes, see Etan Kohlberg, *Imam and Community in the Pre-Ghayba Period*, in *BELIEF AND LAW IN IMĀMI SHĪ'ISM* 25–53 (Etan Kohlberg ed., 1991). See also HARALD MOTZKI, *DIE ANFÄNGE DER ISLAMISCHEN JURISPRUDENZ. IHRE ENTWICKLUNG IN MEKKA BIS ZUR MITTE DES 2./8. JAHRHUNDERTS* [THE ORIGINS OF ISLAMIC JURISPRUDENCE: MECCAN FIQH BEFORE THE CLASSICAL SCHOOLS] (1991) (Marion Katz, trans. 2001) (tracing the activities of the scholarly class in Mecca back to at least the year 661 when Muḥammad's Companion Ibn 'Abbās moved to Mecca to teach); MODARRESSI, *supra* note 37, at 29–32 (tracing the scholarly activities of the period from the accession of the first Imām, 'Alī (the fourth caliph), until the occultation (*ghayba*) of the twelfth and final Imām in 874).

through the early 'Abbāsīd dynasty (r. 750–1258), proto-schools of law developed—regional circles of students who self-consciously followed a principle teacher who was an accomplished, scholarly authority in their local vicinities. The eponymous heads of today's main schools mostly lived during this early period: Abū Ḥanīfa (d. 767), Mālik (d. 795), their student Shāfi'ī (d. 819), Aḥmad b. Ḥanbal (d. 855), and Ja'far al-Ṣādiq (d. 765).⁴⁷

In the middle of the ninth century, these proto-schools developed into larger trends until they formed full-fledged legal schools (between the ninth and tenth centuries), with both positive legal rules and a particular jurisprudential methodology. This jurisprudence included identification and placement of sources in a certain hierarchy of authoritativeness and primacy, as well as methods of source-criticism, primarily of *ḥadīth* works that were gathered in what came to be known as canonical collections.⁴⁸ During this time, dozens of legal schools proliferated; it was only later that they coalesced around five major Sunnī schools (Ḥanafī, Mālikī, Shāfi'ī, Ḥanbalī, Ṣāḥirī) and four Shī'ī schools (Imāmī/Twelve, Ismā'īlī/Sevener, Zaydī/Fiver and Ibādī).⁴⁹ The Ṣāḥirī school is said to have died in the late eleventh

47 There is a vast literature on the origins and development of Islamic law. For an excellent, succinct treatment that covers both Sunnī and Shī'ī schools, see Mottahedeh, *supra* note 17. For an accessible narrative that summarizes many of the developments for Sunnī schools, see WAEL HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* (2005). For other useful overviews of the development of main schools of Islamic law, see MAḤMAṢĀNĪ, *supra* note 38, at 42 (commenting on the periodization of Islamic law); *id.* at 69–86 (discussing the Sunnī and Shī'ī schools of law); CHRISTOPHER MELCHERT, *THE FORMATION OF THE SUNNĪ SCHOOLS OF LAW, 9TH–10TH CENTURIES C.E.* (1997) (summarizing other Sunnī schools generally). For more detailed school-specific studies, see generally JONATHAN BROCKOPP, *EARLY MĀLIKĪ LAW: IBN 'ABD AL-ḤAKAM AND HIS MAJOR COMPENDIUM OF JURISPRUDENCE* (2000) (Mālikī school); YASIN DUTTON, *THE ORIGINS OF ISLAMIC LAW: THE QUR'AN, THE MUWAṬṬ'A, AND MADINAN 'ĀMAL* (1999) (same); Majid Khadduri, *Introduction to AL-IMĀM MUḤAMMAD IBN IDRIS AL-SHĀFI'Ī'S, AL-RISĀLA FĪ UṢŪL AL-FIQH [TREATISE ON THE FOUNDATIONS OF ISLAMIC JURISPRUDENCE]* 8–19, 21–48 (Majid Khadduri trans., 2d ed., Islamic Texts Society 1987) (Shāfi'ī school). For further discussion, see WILFERD MADELUNG, *RELIGIOUS TRENDS IN EARLY ISLAMIC IRAN* 93–105 (1988) (regarding the Ismā'īlī school); *id.*, at 77–92 (regarding the Ibādī school); MODARRESSI, *supra* note 37, at 3–5 (regarding the Shī'ī Imāmī or Twelver school).

48 The six Sunnī canonical *ḥadīth* collections are those of Bukhārī (d. 869), Muslim (d. 874), Abū Dāwūd (d. 886), al-Nasā'ī (d. 888), Tirmidhī (d. 892), and Ibn Mājah (d. 915). On the canonical collections and works of *ḥadīth*-criticism in the Sunnī context, see KAMALI, *supra* note 23, at 87–92, and JONATHAN BROWN, *THE CANONIZATION OF BUKHĀRĪ AND MUSLIM: THE FORMATION AND FUNCTION OF THE SUNNĪ ḤADĪTH TRADITION* (2007). The four Shī'ī canonical *ḥadīth* collections are those of Kulaynī (d. 941), Ibn Bābawayh (d. 991–2), and Naṣīr al-Dīn al-Ṭūsī (d. 1067) (two books). For further discussion, see MODARRESSI, *supra* note 37, at 3–5.

49 On the proliferation and dissipation of the personal schools, see GEORGE MAKDISI, *THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST* 2–4 (1981), which

century with the death of its most prolific scholar, Ibn Ḥazm in 1082, though there are indications that it still has followers in the modern day. Today, laws from each of these major schools are in force somewhere in the Muslim world or in countries with large Muslim minorities.⁵⁰

The rulings of each legal school not only represent the fruits of source-critical methods to address issues of textual authenticity and reliability, but also have gained a large measure of precedential value in both popular and juristic arenas. Popularly, Muslims tend to follow a particular school of law and look to jurists for expositions of that school's commands and prohibitions. For their part, jurists receive training in substantive laws and interpretive methodologies of a particular legal school, which equips them with the ability to issue rulings that are faithful to a certain school and/or its adherents, and that cover contemporary circumstances.

Even expert jurists who formally have attained a certain rank that qualifies them to reformulate rules outside the context of any legal school are bound by precedent.⁵¹ If such jurists attempt to accommodate modern sensibilities, they must contend with traditional views embodied in the received body of precedents as well as the very nature and organization of the legal debates. In this regard, a legal treatise by the late Muḥammad Bāqir al-Ṣadr, who is recognized as having achieved the rank of expert jurist, is interesting.⁵²

In the introduction to his work, Ṣadr criticizes his fellow jurists for an over-reliance on the form for organizing and addressing legal issues bequeathed by tradition. In his view, most treatises are badly written because they slavishly adhere to classical schemes of topical organization and employ excessively technical language.⁵³ This way of

notes that there were 500 proto-Sunnī personal schools, most of which slowly died out by the ninth century.

50 For a breakdown of the geographical distributions, see Norman Calder et al., *Law, in OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD* (forthcoming), available at <http://www.oxfordislamicstudies.com/article/opr/t236/e0473#e0473-s0002>.

51 "Expert jurist" here refers to *mujtahid* or *mujtahid muṭlaq*, and is used to distinguish the highest ranks of jurists that the Islamic legal tradition formally identifies. For the grades of juristic expertise and descriptions of the qualifications necessary to reach the highest level of jurist (*mujtahid muṭlaq*), see generally HALLAQ, *supra* note 6.

52 See ṢADR, *supra* note 22. For his biography, see Mottahedeh, *supra* note 17, at 28–33.

53 See ṢADR, *supra* note 22, at 48–53. Classical *fiqh* works generally were divided into four major categories: ritual law (*ibādāt*), commercial transactions or "worldly affairs" (*mu'āmalāt*), personal status law (*munākiḥāt*, or in modern terms, *al-aḥwāl al-shakḥiyya* or *qānūn al-'ā'ila*), and criminal and tort law (*ḥudūd*, *'uqūbāt* or *jināyāt*). Other sections included civil and criminal procedure (*mukḥāṣamāt* or *qaḍā'*), public international law (*siyar*), and "constitutional," administrative, and tax law (*al-aḥkām al-suṭṭāniyya*). For more

proceeding is problematic because it is far removed from the realities and grammar of today's average reader; it also results in the omission of certain modern issues altogether simply because many contemporary discussions were never brought up in classical *fiqh* books.⁵⁴ Ṣadr departs from the classical formulation to some extent by recategorizing the major sections of Islamic law⁵⁵ and presenting general principles at the start of each chapter, upon which he then expounds with specific examples that include modern considerations in simple language.⁵⁶ But the extent of his departure is limited.⁵⁷ Reform-minded jurists like Ṣadr must always grapple with the weight of precedent in attempting to replace it with their own formulations. This requires convincing arguments as to why new formulations should replace settled rules. Advancing such arguments is an ongoing process amongst similarly minded jurists.

In Iraq, the complex structure of Islamic law is further complicated by the presence of and differences between the Sunnī and Shī'ī schools of law. Iraq's Muslim population is majority Shī'ī with a Sunnī, mostly Ḥanafī, minority. Aside from the Qur'ān and a few well-known practices, Shī'ī and Sunnī law recognize somewhat different bodies of authoritative legal sources.⁵⁸ These differences notwithstanding, the major legal rules in the two schools are similar enough in their broad contours, but can differ significantly in the detailed rules in certain areas—such as matters of personal status.⁵⁹

detailed discussions of these and additional categories, see MAḤMAṢĀNĪ, *supra* note 38, at 24–25 (Sunnī law) and MODARRESSI, *supra* note 37, especially at chapter 3 (Shī'ī law).

54 See ṢADR, *supra* note 22, at 49–50.

55 His categories include ritual law (*al-'ibādāt*), commercial and property law (*al-amwāl*), private/civil actions (*al-sulūk al-khāṣṣ*), and public law (*al-sulūk al-'āmm*). See *id.* at 54–57. Compare these categories to those of the classical formation, *supra* note 53.

56 E.g., ṢADR, *supra* note 22, at 111 (discussing “Islamic” versus scientific determinations of the Islamic calendar, which is central to, *inter alia*, the debate over whether the new lunar month begins with the sighting of the moon or by astronomical calculations).

57 See, e.g., *id.* at 221–22 (the impurity of non-Muslims). Unfortunately, Ṣadr was executed before he got beyond the first book, which was on ritual law. His treatment of social issues and public law would have been much more telling.

58 See *supra* note 37.

59 See, e.g., Etan Kohlberg, *Evolution of the Shī'a*, in E. KOHLBERG, BELIEF AND LAW IN IMĀMĪ SHĪ'ISM 1 (1991) (Afaf Lutfi al-Sayyid-Marsot ed., 1979) (noting major differences in personal status law); Wilferd Madelung, *Shī'ī Attitudes Toward Women as Reflected in Fiqh*, in SOCIETY AND THE SEXES IN MEDIEVAL ISLAM 69 (Afaf Lutfi al-Sayyid-Marsot ed., 1979) (same).

B. In the Context of Islamic Constitutionalism

By using the ambiguous phrase “settled Islamic (legal) rules,” Iraq’s constitutional drafters delegated key questions about the form that the law will assume to later decision makers. Specifically, they left it for others to clarify whether “settled Islamic (legal) rules” equals absolute consensus, whether they intended for that consensus to arise amongst jurists or elected politicians, and whether the “settled” rules should be codified.

1. Consensus

As noted, the new Iraqi Constitution’s omission of “agreed upon (through consensus)” from the incorporation of “settled Islamic (legal) rules” may mean that Iraqi judges or jurists are not limited to operating solely within the confines of past juridical consensus but may exercise some amount of discretion in saying what the law is with respect to a number of factors relevant in the present day.⁶⁰ Despite the omission of the term “consensus,” questions closely relevant to it will still arise for at least two reasons. First, as noted, consensus constitutes one of the four sources of Islamic law for both Sunnī and Shī‘ī Schools.⁶¹ Second, classical discussions of Islamic political theory list the application of Islam’s clear legal rules—including those subject to consensus—as one of the Islamic head-of-state’s core obligations.⁶² The difficulty with this doctrine in the context of Islamic constitutionalism enters in the determination of whether consensus has been reached on particular areas and how this relates to the head of a *democratic* constitutional state merely concerned with but not compelled by Islamic law.⁶³

60 Lisa Hajjar mentions some of those factors: variations in Islamic legal interpretation that reflect the lack of broad consensus in the Muslim community, the relationship between religious law and state power (i.e., the question posed by Islamic constitutionalism), and “the influence of trans-national discourses and movements,” especially in “Islamization” and human rights initiatives. Lisa Hajjar, *Domestic Violence and Shari‘a: A Comparative Study of Muslim Societies in the Middle East, Africa and Asia*, in WOMEN’S RIGHTS & ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 237–38 (Lynn Welchman ed., 2004).

61 See *supra* note 37.

62 E.g., IMĀM AL-ḤARAMAYN AL-JUWAYNĪ, *GHIYĀTH AL-UMAM FĪ ILTIYĀTH AL-ZULAM* 17, 46–47 (Dār al-Da‘wah 1979) (explaining that clear Islamic rules or “legal certainties” (*qawāṭi’ al-shar’*) encompass three categories: (1) clear scriptural text that needs no interpretation, (2) reports so widespread that there is no possibility of corrupted transmission and no doubt as to their origin, and (3) settled consensus (*ijmā’ mun’aqad*)).

63 Scholars debate whether universal consensus could exist on any but a few fundamentals. Amongst Sunnīs, consensus originally referred to the agreement of a few scholars in a

As a practical matter, the indefinite status of consensus or “settled Islamic (legal) rules” leaves open the question of which, if any, contested rules warrant legal cognizance under Iraq’s formulation of its Islamic constitutional scheme. On the one hand, if the state chooses to adopt the majority opinions of just one of the several legal schools, predictability of the law would no doubt increase, at the expense of representative democracy and protections for minority sects. Such a scheme would require a coherent justification for privileging one legal school amongst a populace that affiliates with multiple (equally valid) legal and sectarian identities.⁶⁴ Recent history has illustrated the difficulty, if not impossibility, of such a task. Iraq’s first family law code, which was drafted in 1953 by Egyptian legal reformer Sanhūrī and which privileged Ḥanafī law, led to massive opposition on the part of the Shī‘ī jurists. This strategy of privileging the rules of a single legal school appears to be a purely modern consequence of state-dominance over a united legal regime.

On the other hand, state recognition of the valid interpretations of all or multiple legal schools likely will decrease predictability, but increase opportunities for popular support and perhaps for the vindication of minority interests. This option would require the difficult task of working out a scheme that accommodates legal pluralism. There is some precedent for this. For example, in early Islamic history, Muḥammad and succeeding scholars and community leaders adhered to a doctrine of allowing minority religious interpretations, even if they cut against Islamic (state) law. This was famously repre-

certain locality, as espoused by Mālik, founder of one of the Sunnī schools. See DUTTON, *supra* note 47 (discussing the methods used by Mālik to derive judgments from the Qur’an). Mālik’s pupil, Shāfi‘ī, adopted this position but soon developed it into his own, which became the more mainstream notion: consensus of “the majority of leading jurists in Muslim lands” for legal matters and the “agreement of the Muslim community” on matters of fundamentals. Khadduri, *supra* note 47, at 32, 37–38. It is worth noting that Shāfi‘ī’s concept is expressed in a Sunnī prophetic *ḥadīth* that “my people will never agree on an error.” *Id.* at 38. Taking this statement to signify that the people represent God’s will (*vox populi, vox Dei*), *id.*, the phrase provides a basis for Sunnī scholars to identify Islamic roots of democracy. See, e.g., Khaled Abou El Fadl, *Islam and the Challenge of Democracy*, BOSTON REVIEW, Apr./May 2003, available at <http://bostonreview.net/BR28.2/abou.html> (exploring the challenge of reconciling democracy with divine sovereignty). Amongst the Shī‘a, consensus originally referred to that of the Imams. See MODARRESSI, *supra* note 37, at 3. It only gradually came to signify that of the jurists. In both spheres, the doctrine of consensus was difficult to apply historically because jurists agreed on no objective method for arriving at or identifying consensus beyond universal practices of the community. Khadduri, *supra* note 47, at 38. In fact, consensus was defined negatively: the absence of a claim against consensus for a particular matter; all else was a derivative Islamic legal rule open to reasonable debate.

64 See *infra* text accompanying note 70.

sented in the maxim that “to each people are their own valid forms of marriage,” by which Zoroastrian marriages of mother to son, for example, were permitted even though they were otherwise banned under Islamic law.⁶⁵ The thirteenth-century Mamlūk state (in modern-day Egypt and Syria) convened a council of the four schools of Sunnī law. And in the Ottoman Empire (r. 1299–1924), religious minorities followed their own laws in a “*millet*” system, their legal autonomy circumscribed to areas that did not offend public safety or public mores. These examples represent instances of prior attempts to grapple with the questions of rule-of-law with no single method or institution for interpretation capable of accommodating all of the inhabitants of an Islamic regime. As such, they are historical instances that may be instructive to modern-day questions raised by Islamic constitutionalism in states with diverse populations.⁶⁶ As discussed further below, an important question in either case involves how the state will access and recognize valid legal opinions—be they from Muslim jurists, non-Muslim minorities, or otherwise.

2. Codification

Given the structure of law and institutions under modern constitutionalism, the Iraqi state will also have to decide whether to codify the law or leave it to juristic/judicial discretion. Experiences of other countries again offer limited guidance on the precise form that Islamic personal status law in Iraq will or should assume. In analogous Islamic constitutions, there is no correlation between the constitutional centrality of Islamic law to legislation (“a source” versus “the source”) and the codification of personal status laws. Some countries that render Islamic law “the source” codify the laws of personal status (e.g., Iran, Egypt, and Yemen), while others leave personal status laws uncoded (e.g., Qatar, Saudi Arabia, Oman, and the UAE). Some countries that render Islamic law “a source” similarly codify personal status laws (e.g., Kuwait, Libya, Malaysia, Sudan, and Syria), while others leave personal status laws uncoded (e.g., Bahrain). The decision of whether to codify and the determination of the content of the codification appears to depend very little on constitutional formulations of the Islamic law incorporation and very much on domes-

65 See SUYŪTĪ ET AL., *AL-WASĀ'IL ILA MA'RIFAT AL-AWĀ'IL* 17:234 (Maktabat al-Khānjī 1980) (explaining that the principle is a particular statement of a more general rule: “Every people who believes in something [according to their religion] is bound by [that religion's] rules”); IBN QUDĀMĀ, *MUGHNĪ* (Maktabat al-Qāhirah 1968) 11:36 (same).

66 For another view, see Jackson, *supra* note 17, at 102–07.

tic politics and the local history of the state's relationship with Islamic law or its exponents.

Some have predicted that Islamic family law in Iraq will be uncodified and left exclusively in the hands of the jurists, who will impose restrictions on women's marriage and divorce rights, among other things.⁶⁷ Iraq does not seem to be on that path. In 2004, Resolution 137—a proposal to replace Iraq's 1958 Personal Status Code with "*shari'a*" (as uncoded family law)—failed. In designating an uncoded, amorphous body of law as the basis for family law, Resolution 137 would have transferred personal status laws from a civil to a purely religious (juristic) jurisdiction. Women activists played a prominent role in contesting the resolution, but its ultimate defeat likely had to do with constitutional and institutional concerns about the role of Islamic law on the grounds that an uncoded law would create enormous constitutional difficulties under the new Iraqi Constitution.⁶⁸

The Iraqi Constitution incorporates Islamic law, but it does not shift all interpretive power to jurists or even to Islamic law courts. Indeed, the new Iraqi Constitution does not even create Islamic law courts, unlike the previous Iraqi regime. Instead, it empowers the Supreme Federal Court to rule on the constitutionality of all legislation—which, it is to be remembered, includes Islamic law. The Constitution specifies that the Court will be made up of an unspecified number of judges, Islamic legal experts (jurists?), and ordinary legal experts. The legislature must later determine the precise composition of the Court by a law that passes with a two-thirds majority par-

67 See, e.g., Travis, *supra* note 3, at ¶ 100 (describing the plight of women in Afghanistan dealing with restrictions on their freedom of movement, dress, and rights in marriage and divorce). But see Isobel Coleman, *Women, Islam, and the New Iraq*, FOREIGN AFF., Jan./Feb. 2006, available at <http://www.foreignaffairs.org/20060101faessay85104/isobel-coleman/women-islam-and-the-new-iraq.html> (arguing that Islamic law incorporation will not necessarily harm women because Islamic law can be interpreted in many ways and that the United States can help support more egalitarian interpretations by supporting progressive Muslim scholars); Amira Sonbol, *Women in Shari'ah Courts: A Historical and Methodological Discussion*, 27 FORDHAM INT'L L.J. 225 (2003) (arguing that pre-modern Islamic family law was flexible and that modern codes have imposed patriarchal codifications of hybrid narrow interpretations of Islamic law mixed with Western law). All this underscores the real concern with Islamic law incorporation, which Kristen Stilt insightfully highlighted: what structure for legislation and interpretation will the Iraqi government devise? See Stilt, *supra* note 22, at 754 (listing a series of questions that Iraq must answer as it develops its constitutional and governmental structures vis-à-vis Islamic law).

68 For a description of how women activists campaigned to prevent Resolution 137, which was approved by the Interim Governing Council, from becoming law, see <http://www.womenwarpeace.org/iraq/iraq.htm> (last viewed Jan. 5, 2006) (login required).

liamentary vote.⁶⁹ Thus, there are a few important points to consider about Iraqi-style constitutionalism and Islamic family law that help explain the failure of Resolution 137. The Iraqi Constitution unambiguously and formally incorporates Islamic law; and this incorporation occurred *subsequent* to the Resolution 137 debate. Moreover, the existing family law code—in which a vote against the Resolution was effectively a vote to keep the existing code—was based on Islamic law. Therefore, the defeat of Resolution 137—and its relation to the larger question of codification—was not about the propriety of incorporating Islamic law, but rather about how it should be done. It was about the centrality of juristic authority in Islamic legal interpretation. To see how, consider the perspectives of the parties both for and against the Resolution as a means of moving toward legal reform.

Both supporters and opponents of Resolution 137 desired some measure of reform to existing family laws. Opponents (certain politicians and women's activists) may have wanted reforms, but not if it meant they would have no say in those reforms. Would a return to classical, uncoded Islamic law mean that *only* the jurists could interpret, as historically they have done? There was a fear that notwithstanding the constitutional mandate to uphold both democratic *and* Islamic values, jurists could very well impose a form of family law that was too conservative and uncompromising for popular tastes and against which the populace could do nothing. Resolution 137 signified the unchecked discretion of jurists to determine the law without popular, legislative, or judicial review. It therefore represented an imposition of juristic interpretations on government branches in a way that does not comport with the democratic processes for legislation.

Supporters of the Resolution (primarily certain jurists) wanted reforms that took juristic input into account. Theirs was a proposition of institutional competence: jurists are best equipped to interpret Islamic law. Their primary concern was that the existing codified law was skewed because its provisions were not the output of a proper Islamic legal interpretive process. This complaint followed from earlier juristic objections. Iraqi jurists had challenged the existing Family Law Code because it does not adequately accommodate the Islamic

69 2005 Al-Dustūr al-'Irāqī [Constitution] art. 93.2 (Iraq) (empowering the Supreme Federal Court to interpret the Constitution); *id.* art. 92.2 (specifying that the Court will be made up of an unspecified number of judges (*quḍāt*), Islamic legal experts (*khubarā' fī al-fiqh al-islāmī*), and legal experts (*fuqahā' al-qānūn*), the composition of which is to be determined later by a two-thirds majority of the parliament).

legal pluralism under which various confessional and legal affiliations have traditionally functioned. For example, Muḥammad Baḥr al-'Ulūm, a prominent Iraqi jurist, wrote a tract against the government's attempts to control Islamic family law. His contentions still have some traction today.⁷⁰ His was a critique of Sunnī dominance over Shī'ī law, but the reverse challenge could arise if Shī'ī law comes to dominate Sunnī law. His point was that no single legal school should exclude another. Perhaps the concerns of both supporters and opponents to the Revolution could be ameliorated by some of the balances that democratic institutions might bring to the task of Islamic legal interpretation for a diverse population.

The family law debate raises one final point worth mentioning—the extent to which Islamic constitutionalism is indigenous to Iraq. I have argued that despite the defeat of Resolution 137, the subsequent incorporation of Islamic law indicates that the Iraqi people (or at least the people purporting to act on their behalf) will tolerate, and may even demand, a role for the jurists. But for democratic and constitutional concerns, they do not want a government and laws that are within the *sole purview* of the jurists. It is difficult to attribute these outcomes to “the Iraqi people” point-blank, given that Iraq's new governmental structure and constitutional project was heavily engineered by the United States, is subject to enormous foreign influence, and continues to function under occupation. American commentators readily admit that democracy was “imposed,” though it is more difficult to assess the precise areas of foreign influence on Islamic constitutionalism.⁷¹ One might venture to suggest though that Iraq's *Islamic* constitutionalism arose from within.

70 See Stilt, *supra* note 22, at 751 n.268, 752 n.270 (citing MUHAMMAD BAḤR AL-'ULŪM, AḌWA' 'ALĀ QĀNŪN AL-AḤWĀL AL-SHAKHṢIYYA [SHEDDING LIGHT ON THE PERSONAL STATUS LAW] (1963) and noting that his critiques are still powerful amongst Shī'ī politicians and jurists, having served as the impetus behind Resolution 137).

71 See, e.g., Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857 (2005) (responding to criticisms of his role, as a foreigner and representative of the occupying force, in advising Iraq's provisional government, but recognizing that an Iraqi Constitution ultimately should be drafted and accepted by Iraqis themselves). On the overall project, perception and substance play a key role to legitimacy and viability of Iraqi constitutional law. See Ash Ü. Bâli, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT'L L. 431, 445 (2005) (noting that challenges to establishing democratic rule of law “are further exacerbated by the fact that any new institutions are liable to be perceived as the products of occupation” and that, “[t]o inspire confidence in the rule of law, the legitimacy deficit suffered by institutions perceived as external impositions will have to be overcome”); cf. Gilbert S. Merritt, Senior Judge, U.S. Court of Appeals for the Sixth Circuit, *Reconstruction and Constitution Building in Iraq*, Address at Vanderbilt University Law School (Jan. 23, 2004), in 37 VAND. J. TRANSNAT'L L. 765, 774, 778 (2004).

Iraq's jurists, and leading Iraqi cleric Ayatollah 'Alī al-Sistānī in particular, were influential in ensuring Iraq's constitutional incorporation of Islamic law.⁷² In the Interim Period, Coalition Provisional Authority head Paul Bremer vowed to veto any constitution in the Interim Period that incorporated Islamic law.⁷³ Sistānī directly countered this; he is credited with insisting on the incorporation of Islamic law into the Constitution. With his quiet opposition in a war of wills with the American-led CPA, Sistānī's victory revealed the latent and not inconsiderable power and legitimacy that Iraqi jurists enjoy. Iraqi jurists are a strong, independent body with a long legacy of intellectual activity and institutional development, particularly in the Shī'ī learning center, Najaf.⁷⁴ They have been active in the political arena since at least the Iraqi Revolution of 1958.⁷⁵ Their victory in facilitating Islamic constitutionalism reflects their power and authority;

("[T]he promise we have made to Iraq [is] of a constitutional democracy, to be held up as a model in the Middle East. . . . Bremer has completely botched this job. There are, I think, plausible reasons for our being there [in Iraq], but there is no plausible reason in my view for doing it the way we are doing it.").

- 72 On Sistānī's considerable influence, see Roy P. Mottahedeh, *Keeping the Shi'ites Straight*, RELIGION IN THE NEWS (Summer 2003), available at <http://www.trincoll.edu/depts/csrpl/RINVol6No2/Keeping%20the%20Shi'ites%20Straight.htm> ("[N]o other Iraqi mullah possesses his learning or piety, and he has more followers in the Twelver Shi'ite world than any other Source [of Imitation] alive. . . . It will be very hard, and possibly very unwise, to build a new Iraq without allowing some of the Shi'ite clergy to participate.").
- 73 See Jim Krane, *Touting Women's Rights, U.S. Administrator Threatens Veto of Iraqi Islamic Law Measure*, ASSOCIATED PRESS, Feb. 16, 2004 (noting that head of the Coalition Provisional Authority, Paul Bremer, feared that women's rights would be "rolled back in the interim constitution . . . [through] Islamic restrictions"); see also Stilt, *supra* note 22, at 742–44 (noting how the Drafters of Iraq's Interim Constitution managed to incorporate Islamic law into the Constitution, over Bremer's concerns, without any of the qualifiers that he suggested, like "principles of Islamic Sharia" and "a source of inspiration for the law"). As discussed *supra* Part II, the permanent Constitution's incorporation of Islamic law is worded with even more particularity. See generally L. PAUL BREMER III & MALCOLM MCCONNELL, *MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE* (2006); Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 *FORDHAM L. REV.* 883 (2006).
- 74 MALLAT, *supra* note 41, at 38 (noting that the juristic class is so strong and entrenched that it almost functions like a quasi-state, awarding stipends and setting curricula over which the government had no control); *id.* at 34–35 ("The jurists are not so much interpreters of the law as the *exclusive interpreters* of religious law, of law *qua* religion. The uniqueness of modern Shi'ism lies in the autonomous body of Shi'i *mujtahids* who are vested with the protection of the law—and religion—through their interpretive power." (first emphasis added)).
- 75 Most notably, the prominent jurist Muḥammad Bāqir Ṣadr became active in the Da'wa party, see Mottahedeh, *supra* note 17, 30–31; see also JOYCE N. WILEY, *THE ISLAMIC MOVEMENT OF IRAQI SHI'AS* 73 (1992) (noting that the tensions became violent in 1979, but that the Iraqi jurists maintained a strong presence because, unlike the jurists of the Sunnī world, they remained relatively independent of the government).

but the defeat of Resolution 137 shows that there are limitations to that power in the context of Iraq's fledgling democracy.

III. GOVERNMENTAL DECISION-MAKERS AND JURISTS AS A FOURTH BRANCH

A central claim of this Article is that tensions between government branches and the juristic class face every Islamic constitutional country aspiring to a democratic government that resonates with its citizens' historical and religious sensibilities, and that these countries contemplate some relationship between the groups as a result. The challenge of Islamic constitutionalism is twofold. One challenge concerns the mere theoretical possibility of realizing a functional governmental structure in which religious norms constitutionally balance with human rights and democratic norms. This might seem like a challenge facing *every* constitutional system that recognizes a role for or accommodates religion. Yet there are added challenges in the Islamic constitutional context because of the trenchancy of Islamic law—an ostensibly religious law—as a source for state law. Islamic political theorists have tended to resolve these challenges by dissociating stilted notions of Islamic law from dominance over state law.

Another challenge concerns the practical workings of such systems. Modern Islamic constitutional countries have each derived individual arrangements in this regard, with varying degrees of success and functionality. Notably, Islamic constitutional governments that consider the place of Islamic law invariably have contemplated some relationship with the jurists—ranging from complete exclusion (in non-Islamic constitutional countries such as Turkey) to dominance (in Islamic constitutional countries such as Iran).⁷⁶ In this context, the body of jurists typically included in these countries' processes of legislation and adjudication may be seen as Islamic constitutionalism's Fourth Branch of government.

⁷⁶ Though I argue that all Islamic constitutional countries must deal with the question of the jurists' role, the same is not true for other Muslim-majority countries, and this argument does not imply that the state relationship with the jurists will be inclusionary. As noted, some, like Turkey, are completely secular, while others that purport to adhere to Islamic constitutionalism exclude jurists. For a list of groupings in this context, including non-Islamic constitutional states, see *Constitutionalism, Human Rights, and the Rule of Law in Iraq: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) [hereinafter *Iraq Hearing*] (statement of Khaled Abou El Fadl, Professor of Islamic Law, UCLA School of Law), available at http://judiciary.senate.gov/testimony.cfm?id=826&wit_id=2348; cf. Stilt, *supra* note 22, at 719 (describing the tension in Iran between different populations who disagree about the role of religion in government).

A. Conceptual Frameworks

A growing body of literature theorizes on the compatibility of "Islam and democracy." As stated, the dichotomy may be misleading. Rather than comparing Islam (a religion) to democracy (a form of governance), these studies actually query whether support for the notion of rule by the people can be found in sources on Islamic tradition.⁷⁷ In general, the studies conclude that no inherent contradiction exists by identifying the roots of democratic governance in Islamic legal and political thought and arguing that there are ways in which popular sovereignty can co-exist with divine sovereignty.⁷⁸

In Iraq's Islamic constitutional context, such treatments rightly assume that the Iraqi Constitution's clauses on religion and Islamic law stand in some tension to the clauses on rights and democratic proc-

77 The sources include two sets of literature: Islamic political theory (legal and political texts that draw on Qur'ānic precepts, the prophetic example, and historical practice in early Muslim societies under the caliphate system) and Islamic theology (the dogma that posits God as sovereign). See, e.g., NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* (2003) (arguing for the possibility of Muslim democracies); Abou El Fadl, *supra* note 63 (providing an example of Islamic political theory); Jackson, *supra* note 17 (arguing that Islamic theology can be the basis of a democracy, although such a democracy may not conform to Western models).

78 See *supra* note 77. But see Travis, *supra* note 3, ¶ 2 ("The new constitutions of Afghanistan and Iraq have enshrined Islam as the official religion and source of legislation, which no social policies may contravene. This codification of religious fundamentalism was an inevitable byproduct, some observers contend, of the delegation of the nation-building process in both countries to religious extremists who enjoyed devoted followings of armed militiamen."). Abou El Fadl, Feldman, and others who argue that Islamic tradition comports with democratic forms of governance, tend to focus on *procedural* forms of democracy. By contrast, Travis and others conclude that Islam and democracy are incompatible on the grounds that Islamic values are antithetical to *substantive* notions of democracy. While democracy has many different definitions and types, it is enough for our purposes to note basic differences between substantive and procedural forms of democracy. In my view, the procedural focus is a more solid mode of comparative analysis because: (a) there is general consensus that procedural democracy is essential and basic to the meaning of democracy, whereas constitutions in robust democracies each enshrine different substantive values; and (b) it is closer to the analysis of the interpretive process that has been applied in the context of American law: for example, where substantive constitutional values typically adopt procedural form. See, e.g., Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 751-55 (1982) (arguing that law borrows from morality when it comes to substantive notions like "liberty" and "equality," that the extent of borrowing differs depending on the legal tradition, and that even positivism—which attempts to separate law from morals—cannot do so absolutely because judges must try to give meaning to public moral values enshrined in the Constitution). For common general critiques of substantive democracy, see generally ROBERT DAHL, *ON DEMOCRACY* (1998) (challenging representative democracy); JOHN STUART MILL, *ON LIBERTY* (David Bromwich & George Kateb eds., Yale University Press 2003) (1859) (taking issue with the strictures that substantive rights place on democratic procedure).

esses. In part, this tension is a regular feature even of “old” constitutions that both recognize a role for religion and prohibit religious discrimination through a liberal democratic promise of equality. For example, European Union Member nations Finland, Greece, and the United Kingdom each establish some form of Christianity as the official state religion. At the same time, the constitutions or laws of each country also contain provisions for the equality and rights of their citizens, regardless of religious affiliation.⁷⁹ In these countries, the state must ensure that the established religion does not impinge on the freedoms of any of its citizens and that religion will never impede fair democratic processes. The United States handles the religion-state problem uniquely with its twin Establishment and Free Exercise Clauses.⁸⁰ It, too, must ensure that its commitment to church-state separation does not impinge on the freedoms of its citizens. In sum, these countries all seek to balance religion with democratic norms.⁸¹

⁷⁹ See 2000 Suomen Perustuslaki [Constitution] § 76 (Fin.) (incorporating the Church Act, which regulates the Evangelical Lutheran Church of Finland and the Finnish Orthodox Church, according each legal protection and powers to levy taxes on their respective communities); *id.* at § 6 (equality clause); see also 2001 Syntagma [Constitution] art. 3, par. 1 (Greece) (specifying that the Greek-Orthodox dogma is the prevailing religion, that the Church of Greece is inseparably united in doctrine with the Ecumenical Patriarchate of Constantinople and with all other Orthodox Churches, and that the Church is self-administered). The United Kingdom has no formal written constitution. A combination of acts establish the Church as the state religion and require freedom of religion. *E.g.*, Human Rights Act, 1998, c. 42, § 13 (Eng.), available at <http://www.opsi.gov.uk/acts/acts1998/19980042.htm> (protecting the right to freedom of religion); Act of Settlement, 1700, 6 Will. 3, c. 2, §§ II–III (Eng.), available at <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1565208> (requiring that anyone who will become a King or Queen of England to be a member of the Church of England).

⁸⁰ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”); see also U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”). Similar to European states, a host of statutes further define the contours of the Establishment/Free Exercise Clauses, and the Supreme Court clarifies the constitutional and statutory standards. For the seminal case detailing requirements for legislation concerning religion, see *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (declaring that while laws must have a “secular . . . purpose,” only “excessive . . . entanglement” renders them impermissible (emphasis added)).

⁸¹ Contrast this with France (an old constitution) and Turkey (a newer constitution—ratified in 1982), in which secularism can curtail religious freedoms. See 1958 CONST. 1 (Fr.) (declaring France to be a secular nation); Loi du 9 décembre 1905 relative à séparation des Églises et de l’État, as amended July 29, 2005, tit. 1, art. 2, Journal Officiel de la République Française [J.O.] [Official Gazette of France], available at <http://www.assemblee-nationale.fr/histoire/egliseetat/sommaire.asp>, translation available at http://www.concordatwatch.eu/showkb.php?org_id=867&kb_header_id=849&kb_id=1525&order=kb_rank%20ASC (“La République ne reconnaît, ne salarie ni ne subventionne aucun culte.” [“The Republic does not recognize, salary, or subsidize any religion.”]); see also No. 288 Loi encadrant, en application du principe de laïcité, le port de signes ou de

Iraq faces a similar challenge. Its Constitution creates a system that establishes Islam as the state religion. The added complication is that Iraq not only establishes a state religion, but it also incorporates a legal system of religious origin as a source of state law. The extent and implications of this added challenge—particularly vis-à-vis the jurists, given their historical role in interpreting Islamic law—are the subject of this Article.

To be sure, like Iraq, some Western nations incorporate religion in legislation and adjudication.⁸² But unlike Iraq, such practices typically are doctrinally impermissible under their laws. Most constitutional systems direct legislators to draw upon secular sources for law-making, and when constitutional courts review the propriety of such laws, they are to do so with respect to a secular legal regime. By contrast, Iraq's Constitution permits, indeed directs, legislators and judges to draw upon Islamic law. Given the dual role for Islamic and democratic principles—as sources of law-making and adjudication—how can Iraq negotiate its version of tensions between religion and the state?

tenues manifestant une appartenance religieuse dans écoles, collèges et lycées publics, Assemblée Nationale, Douzième Législature (2004), available at <http://www.assembleenat.fr/12/pdf/ta/ta-0253.pdf> (forbidding the display of conspicuous religious symbols in the French public); Justin Vaïsse, *Veiled Meaning: The French Law Banning Religious Symbols in Public Schools* (Brookings Institute, 2004) (noting that the law is also referred to as the "headscarf ban," because of the Muslim religious symbols that it implicitly targeted, given previous calls and defeated proposals for a ban on headscarves). France organizes religion through official religious councils, one of which is the French Council for the Muslim Religion formed in 2002 and 2003. See Jonathan Laurence, *From the Élysée Salon to the Table of the Republic: State-Islam Relations and the Integration of Muslims in France*, 23 FRENCH POL., CULTURE & SOC'Y 37, 55 (2005) (describing the creation of the French Council of the Muslim Religion).

Compare Turkey's similar form of religion-state separation that followed from Kemal Atatürk's 1924 westernization movement and resulted in subordination of religion to state, following the French model of laïcité. See 1982 Türkiye Cumhuriyeti Anayasası [Constitution] art. 10 (Turk.) (equality clause); *id.* art. 14 (human rights clause); *id.* art. 24 (freedom of religion); *id.* art. 2 (affirming the secular nature of the Turkish Republic). Until February 2008, Turkey had a similar ban on headscarves in public institutions; this ban was upheld by the European Court on Human Rights, see *Sahin v. Turkey*, App. No. 44774/98 (Eur. Ct. H.R. June 29, 2004), available at http://www.associazione.deicostituzionalisti.it/cronache/giurisprudenza_comunitaria/cedu_velo/Sentenza_cedu_velo.pdf, but was recently overturned by the new Turkish Parliament, see *Turkey and Islam: Veils of Half-Truth*, ECONOMIST, Feb. 16, 2008, at 30.

⁸² See James Q. Whitman, *Church and State: Why Are America and Europe So Different?*, 3-7, <http://www.law.berkeley.edu/centers/kadish/Whitman%20Church%20and%20State%20for%20Boalt%20091406.pdf> (demonstrating the important role religion plays in American politics).

One proposal has been advanced by Abdolkarim Soroush, who has been described as the foremost thinker on Islam and democracy.⁸³ He suggests a conceptual framework for envisioning a robust democracy that is "religious."⁸⁴ For him, those who argue that Islam is incompatible with democracy do so only because they erroneously conceive of Islamic constitutional governments as ones that concentrate power in the hands of jurists and discriminate on the basis of gender and religion according to a monolithic view of the barshest legal rules articulated by jurists. This obscures the processes of interpretation and deliberation that can and should take place in a constitutional democracy where "we the people" champion religious values in particular. In fact, in his conception, a state would be described as religious only according to the popular will of the majority; and the voices of that religious majority would express themselves through democratic processes against the backdrop of constitutional protections for human rights and freedoms for minorities in particular.⁸⁵

Soroush contends that any potential conflicts that Islamic mores visit upon democratic processes emerge with apparent tensions between reason and revelation, but that such conflicts are overcome once revelation is understood in context. As embodied in religion, he argues, revelation is nothing more than evolving religious *understanding* that has been articulated and updated (or not) through human interpretive processes.⁸⁶ Thus understood, religion constitutes a rational discipline analogous to other scientific disciplines. Like science, which best approximates a description of the corporal world according to ongoing developments in an ever-changing field, religion reflects developing understandings of a moral universe. Building upon past knowledge and new developments, the conclusions or theories of both science and religion expand and contract over time, achieving approximations that are at times closer to, and at other times far away from, the mark.⁸⁷ Like scientific reasoning, religious

83 See FOROUGH JAHANBAKSH, ISLAM, DEMOCRACY AND RELIGIOUS MODERNISM IN IRAN (1953–2000): FROM BĀZARGĀN TO SOROUGH 143 (2001) (describing Soroush's academic grounding in science, Islamic thought, and politics).

84 See SOROUGH, *supra* note 17, at 133–34. There is some indication that Soroush recently has revised his views. See *infra* note 87.

85 *Id.* at 145.

86 *Id.* at 134, 144.

87 This is the argument advanced in Soroush's most famous (and most controversial) book: QABZ VA BASAT-I TEORIK-I SHARI'AT: NAZARIYEH-YI TAKAMOL-I MA'REFAT-I DINI [EXPANSION AND CONTRACTION OF RELIGIOUS THOUGHT: A COMPREHENSIVE THEORY OF RELIGIOUS KNOWLEDGE] (7th ed. 2002). But see ABDOLKARIM SOROUGH, REINVENTING THE

reasoning (interpretation) is not bound to pre-existing assumptions, and in that sense, he says, it is secular.⁸⁸ For Soroush, a coherent form of practical reasoning should guide interpretation in both spheres, and its development should be facilitated by an open and democratic exchange of ideas. In the sphere of religious democracy in particular, Soroush makes the Rawlsian argument that the role of reason is "collective . . . arising from the kind of public participation and human experience that are available only through democratic methods."⁸⁹

For Soroush, advocating the primacy of reason over religion in the sphere of governance is different from advocating Western "extreme liberalism,"⁹⁰ which should not be equated to democracy itself.⁹¹ Soroush subscribes to a proceduralist view of democracy. For him, *democracy* requires elections (popular sovereignty and political process) and a separation of powers (institutional structure).⁹² And *liberal* democracy limits the decisions of the populace and their institutions with certain Western Enlightenment and Revolutionary ideals, such as particular forms of equality, freedom, and other substantive rights.⁹³ These liberal values enrich the system and promote justice even as they limit absolute expressions of popular will and aim to prevent undesirable outcomes—like Nazism, fascism, or invidious discrimination. That these values place strictures on the popular will may render them undemocratic according to proceduralist views such as Mill's; yet these same liberal values reflect ideals that the people once selected or to which they at least acquiesce.⁹⁴

Soroush argues that *religious* democracy—where the substantive values extend from religion—is similar. For example, in Islamic intellectual and legal history, considerations of the public interest and God's justice extend from rational theological and philosophical discussions.⁹⁵ In general, the argument goes, values are not legal, but ethical; they are rational expressions of the evolving moral sense of society at large, extra-legal sentiments of the populace that give rise

MU'TAZILITE EXPERIMENT (forthcoming) (possibly distancing himself from these earlier views).

88 SOROUSH, *supra* note 17, at 67.

89 *Id.* at 127.

90 *Id.* at 134.

91 *Id.* at 68, 134, 144.

92 *Id.* at 134.

93 *Id.*

94 *Id.* at 151.

95 *Id.* at 128–29.

to particular laws.⁹⁶ Democracy that recognizes religion or Islamic law merely introduces other substantive values and supports a complementary relationship between governance and religion: citizens may dissent by calling upon shared religious mores to play a role in constructively critiquing state action on moral grounds and may thereby augment values of justice, freedom, and liberty.⁹⁷

In his reflections about democratic theory in a religious context, Soroush draws upon his critique of the Iranian experiment, which he views as a failed attempt at democratic Islamic constitutionalism. But he does not conclude that such attempts always must fail. Rather, he insists that governments can be both religious and democratic, provided they take a dynamic view of legal interpretation⁹⁸ and negotiate the proper relationship with the juristic branch in doing so. The implication is that in Iraq, if the people followed democratic processes of constitutional ratification and elections to select a form of religious and liberal democracy that incorporates Islamic law,⁹⁹ this arrangement must be respected. It is up to the government, under this scheme, to contemplate the substance of the Constitution's multiple

⁹⁶ *Id.*

⁹⁷ *Id.* at 142, 152–53 (“Religions, as bulwarks of morality, can serve as the best guarantors of democracy.”); *cf. generally* STEPHEN L. CARTER, *CULTURE OF DISBELIEF* (1993); STEPHEN L. CARTER, *DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* (1998). Of course the sticking point between constitutional and Islamic law scholars on the one hand and Islamists who promote a form of traditional Islamic law on the other is whether pre-modern values *override* rather than augment modern conceptions of justice, freedom, and liberty.

⁹⁸ Without using the phrase, Soroush uses the idea of “dynamic interpretation” developed by American legal scholars. *See, e.g.*, RICHARD FALLON, *THE DYNAMIC CONSTITUTION* (2004); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994). The idea of dynamism is countered by formalism or new textualism in the American context, and by salafi readings in the Islamic legal context, in which foundational or constitutional texts are seen to be static documents that should be interpreted according to original intent. *See, e.g.*, ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997) (laying out the new textualist approach); John Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 120–28 (2001) (arguing that the Constitution constrains the authority to interpret and noting that the proper role of the judiciary is not to be an interstitial law-maker through broad interpretation but a “faithful agent” to the legislature). Justice Scalia has been quoted as saying, “The Constitution is not a living organism, it is a legal document. It says something and doesn’t say other things. . . . [Y]ou would have to be an idiot to believe that [the Constitution] . . . has to change with society, like a living organism” Jonathan Ewing, *Scalia Has Harsh Words for Those Who Believe in ‘Living Constitution,’* LAW.COM, Feb. 15, 2006, <http://www.law.com/jsp/article.jsp?id=1139911515240>. The salafi originalist debate with Islamic legal “dynamists” is less well (or colorfully) documented in the secondary literature, but the parallels are close.

⁹⁹ For a discussion of the extent to which Iraq’s constitutional drafting and ratification was a result of legitimate democratic processes, see *supra* notes 71–72 and accompanying text.

components and to determine exactly where Islamic law falls within that scheme.

A second proposal takes up where the latter left off. Islamic legal scholar Khaled Abou El Fadl argues that democracy is the best system for Islamic governance¹⁰⁰ and arguably may be taken to suggest that jurists can or should play a consultative role in defining the nature and content of Islamic law for a democratic Islamic constitutional regime:

I would suggest Shari'ah ought to stand in an Islamic polity as a symbolic construct for the divine perfection that is unreachable by human effort. . . . Jurists ought to continue to explore the ideal of Shari'ah and to expound their imperfect attempts at understanding God's perfection. As long as the argument constructed is normative it is unfulfilled potential to reach the Divine Will. Significantly, any law applied is necessarily a potential-unrealized. Shari'ah is not simply a collection of *ahkam* (a set of positive rules) but also a set of principles, a methodology, and a discursive process that searches for the divine ideals. As such, Shari'ah is a work in progress that is never complete.

To put it more concretely: if a legal opinion is adopted and enforced by the state, it cannot be said to be God's law.¹⁰¹

By acknowledging the limited yet present role of Islamic law, Abou El Fadl is doing three things: (1) acknowledging the jurists as the historical interpreters of Islamic law, thereby (2) suggesting some state recognition for their deliberations, but (3) insisting that such deliberations must not receive more authoritative weight than due.

This view follows historical trends in Islamic political theory, albeit in the new guise of discussions concerning Islamic constitutionalism and democracy. Jurists historically have long enjoyed interpretive legal authority and have been viewed as the repositories of institutional competence necessary to interpret and articulate Islamic law. This was a result of twin theoretical and historical circumstances: the idea

100 Abou El Fadl, *supra* note 38, at 10 ("In my view, there are several reasons that commend democracy, and especially a constitutional democracy, as the system most capable of promoting the ethical and moral imperatives of Islam. . . . [I]n essence, I would argue that a democracy offers the greatest *potential* for promoting justice, and protecting human dignity, without making God responsible for human injustice or the infliction of degradation by human beings upon one another. . . . A constitutional democracy avoids the problem [of 'having a small group of people appointing themselves as the voice of God, and speaking in God's name'] by enshrining some basic moral standards in a constitutional document, and thus, guarantees some discernment and differentiation, but, at the same time, a democracy insures that no single person or group becomes the infallible representative of divinity.").

101 Abou El Fadl, *supra* note 63 (arguing that human effort can determine a course of action that is potentially synonymous with God's law, but human action is always necessarily imperfect).

that the community leader was to uphold Islamic law¹⁰² and that the jurists were to be independent from the state.¹⁰³ Thus, jurists concerned with the ruler's obligations to Islamic law (and thus to God and the community) attempted to delineate, and perhaps restrict, areas of his discretionary authority over matters of administration and law.¹⁰⁴ The inverse of the ruler's legal jurisdiction was theirs. In order for him to follow and apply the law, jurists reasoned, he would have to consult with them or yield authority over purely legal determinations to them. To support their arguments, typically jurists *cum* political theorists contemplated an informal arrangement, calling up historical precedents where Muslim rulers consulted the jurists—from the Prophet through the 'Abbāsid caliphs.¹⁰⁵ Some even en-

102 Indeed, the first idea was the *raison d'être* of the state and the basis for a ruler's claim to legitimate authority over a Muslim polity. See, e.g., MUHAMMAD B. AL-TAYYIB AL-BAQILLĀNĪ, AL-TAMHĪD FĪ AL-RADD 'ALĀ AL-MULĤIDA AL-MU'AṬṬALA WA-AL-RĀFIḌA WA-AL-KHAWĀRIJ WA-AL-MU'TAZILA 56 (Dar al-Fikr al-'Arabi 1989); ABŪ AL-ḤASAN 'ALĪ B. MUHAMMAD AL-MĀWARDĪ, AL-AḤKĀM AL-SULTĀNIYYA [THE LAWS OF ISLAMIC GOVERNANCE] ch. I (Muhammad Fahmī al-Sarjānī ed., Wafaa Wahba trans. [THE ORDINANCES OF GOVERNMENT], 1996) (1978); IBN AL-JAWZĪ, 1 AL-MİSBĀḤ AL-MUḌĪ' FĪ AL-KHILĀFAT AL-MUSTADĪ' 93 (Ibrahim Najjiyya ed., Matba'at al-Awqaf 1979); see also YUSUF IBISH, THE POLITICAL DOCTRINE OF AL-BAQILLĀNĪ (1966). For Shī'ī views, see AL-SHARĪF AL-MURTAḌĀ, AL-SHĀFĪ FĪ AL-IMAMA; see also A. K. S. LAMBTON, STATE AND GOVERNMENT IN MEDIEVAL ISLAM 219–69 (1981), and Wilfred Madelung, *Imāma*, in 3 ENCYCLOPEDIA OF ISLAM 2d ed. 1163–69 (1954–2005).

103 See, e.g., Abou El Fadl, *supra* note 38, at 30–31 (“[B]y the . . . 10th century, Muslim jurists had established themselves as the legitimate and exclusive authority empowered to expound the law of God. Only the jurists were deemed to possess the requisite level of technical competence and learning that would qualify them to investigate and interpret the Divine will. . . . However, pursuant to the powers derived from its role as the enforcer of Divine laws, the State was granted a broad range of discretion over what were considered matters of public interest [known as the field of *al-siyasah al-Shar'īyyah*]. The State's rule-making activity in the exercise of this discretion was considered to be akin to regulatory administrative rules that have temporal weight, but that are not a part of binding precedents of Shari'ah law.” (second alteration in original)).

104 This pushed Māwardī to write what is regarded as the first treatise exclusively devoted to the subject, written at a time when caliphal authority was waning and de facto rulers (*sultans*) threatened to assert increasing authority over matters of law. See generally MĀWARDĪ, *supra* note 102 (explaining the contours, jurisdiction, and interactions of administrative law, or even administrative prerogative, to determine the law with respect to Islamic law); see also JACKSON, *supra* note 23; Sherman Jackson, *From Prophetic Action to Constitutional Theory: A Novel Chapter in Medieval Muslim Jurisprudence*, 25 INT'L J. MIDDLE E. STUD. 71, 71–90 (1993).

105 See, e.g., IBN AL-JAWZĪ, *supra* note 102, 216–20 (Nājiyya 'Abd al-Allāh Ibrāhīm ed., n.d.) (noting that the first caliph, Abū Bakr, is said to have instructed the scholars to advise him, telling them to correct him if he strayed, that Umayyad Caliph Sulayman b. 'Abd al-Mālik, used to consult with [Meccan jurist] 'Aṭā' b. Abī Rabāḥ, and that likewise 'Abbāsid Caliph Hārūn al-Rashīd would ask [Medinan jurist and Mālikī-school eponym] Mālik b. Anas and others for their input, as did 'Abbāsid Caliphs Amīn and Ma'mūn); see also Abou El Fadl, *supra* note 63, at 7 (“The Qur'an instructs the Prophet to consult regularly with

couraged a formal relationship. For example, Ibn al-Jawzī argued that a ruler should ensure the presence of the “major scholars” at his decision-making sessions.¹⁰⁶

Such historical precedent offers both opportunities and challenges to the idea of a functioning democracy under Islamic constitutionalism. On the one hand, pre-modern jurists’ theories concerning Islamic law and the state could be seen as imposing a requirement of limiting government by the rule of law. These theories could provide an opportunity for a historically grounded ideal of limited powers in the government and amongst the jurists in an Islamic constitutional state. And they could be seen to restrict the scope of juristic competence to matters that involve religio-legal issues rather than political-administrative or factual determinations.¹⁰⁷ Accordingly, they also may suggest more ready acceptance amongst the populace (“We the People”) of Muslim-majority states and thus legitimacy for the government. All of these conceptions could serve to bolster and temper the modern proposals concerning Islamic constitutionalism.

But on the other hand, pre-modern juristic theories pose challenges to a democratic constitutional ideal because of the possibilities for abuse. For example, these same theories of law-limited rule have been viewed (among early and modern jurists) as a requirement to implement particular rules of Islamic law.¹⁰⁸ Abou El Fadl has noted that this is problematic because Islamic law is seen as a static body of rules divorced from the complexities and dynamism of legal interpretation:

[W]e must distinguish between the idea of the supremacy of law, and the supremacy of legal rules. . . . [A] government could implement Shari’ah criminal penalties, prohibit usury, dictate rules of modesty, and so on,

Muslims on all significant matters and indicates that a society that conducts its affairs through some form of deliberative process is considered praiseworthy in the eyes of God (3:159; 42:38). There are many historical reports suggesting that the Prophet consulted regularly with his Companions regarding the affairs of the state. In addition, shortly after the death of the Prophet, the concept of *shura* (consultative deliberations) had become a symbol signifying participatory politics and legitimacy.”)

106 E.g., IBN AL-JAWZĪ, *supra* note 102, at 216.

107 See *Iraq Hearing*, *supra* note 76, at 16.

108 For example, the obligation for rulers to uphold Islamic law for the purpose of preserving law and order in the public sphere has been expressed in terms of imposing fixed criminal penalties. E.g., MĀWARDĪ, *supra* note 102, at 312; ABŪ ISHĀQ IBN FARHŪN, 2 TABSĪRAT AL-ḤUKĀM FĪ USŪL AL-AQĀDIYA WA MANĀHIJ AL-AḤKĀM 115–16 (Beirut 1995); QARĀFĪ, 3 TAḤDHIḤ AL-FURŪQ WA AL-QAWĀ’ID AL-SUNNIYYA FĪ AL-ASRĀR AL-FIQHIYYA 845 (Cairo, 1926–1928). In the modern day, it has been expressed in similar terms in Northern Nigeria, for instance, where a return to Islamic law has meant in part a return to imposing fixed criminal penalties.

and yet remain a government of unlimited powers not subject to the rule of law. This is because Sbārī'ah is a general term for a multitude of legal methodologies and a remarkably diverse set of interpretive determinations.¹⁰⁹

In more specific terms, these theories could be taken to ignore the role of human agency and the deliberative-consultative process in interpreting the law. These ideas, too, were amply represented in Islamic tradition. One anecdote, for instance, tells of a time of strife between 'Alī (the fourth caliph) and his one-time followers, who disputed his decision to submit to arbitration to resolve Umayyad contender Mu'āwiyā's challenge to his caliphate:

'Ali touched the Qur'an while instructing it to inform the people about God's law. Surprised, the people gathered around 'Ali exclaimed, "What are you doing?! The Qur'an cannot speak, for it is not a human being." Upon hearing this, 'Ali exclaimed that this is exactly the point he is trying to make. The Qur'an, 'Ali explained, is but ink and paper, and it does not speak for itself. Instead, it is human beings who give effect to it according to their limited personal judgments and opinions.¹¹⁰

According to Abou El Fadl, realizing this can avoid the "dogmatic superficiality of proclamations of God's dominion or sovereignty in order to legitimate and empower what are fundamentally human determinations."¹¹¹

* * *

Considered together, these conceptual proposals for a functional Islamic constitutional government yield a few indispensable observations. The scholars advancing these views argue that a successful government in that context acknowledges the indeterminacy of the law and the difference between political and religious jurisdictions, admits the human agency of jurists and legislators in interpreting the law, and recognizes the historical and institutional competence of the jurists while avoiding establishing or permitting their structural or institutional dominance over the legislative or legal interpretive sphere. These offer useful points to bear in mind when considering new Islamic constitutional states like Iraq, stopping just short of suggesting practical forms that such collaboration and reconsideration between the government and the jurists might take. Those issues cannot be

109 Abou El Fadl, *supra* note 38, at 28.

110 *Id.* at 15–16 (citing 14 AHMAD B. 'ALĪ B. ḤAJAR AL-'ASQALĀNĪ, FATH AL-BĀRĪ BI-SHARḤ AL-BUKHĀRĪ 303 (Dar al-Fikr 1993); 7 MUHAMMAD B. 'ALĪ AL-SHAWKĀNĪ, NAYL AL-AWTĀR: SHARḤ MUNTAQĀ AL-AKHBĀR MIN AḤĀDITH SAYYID AL-AKHYĀR 166 (Dar al-Hadith 1993)).

111 *Id.* at 16.

predicted, for they depend on further elaboration of the Iraqi Constitution by Iraqi law-makers and adjudicators. But existing models that have charted various paths in that regard may be helpful in conceptualizing possible arrangements.

B. Comparative Models

One way of examining questions of the governmental arrangement that Islamic constitutionalism might assume is to examine the forms that it has assumed in other countries in the region. Regional Islamic constitutional countries present three models of institutional relations between the government and the jurists, with respect to Islamic legal interpretation. At one extreme is dominant constitutionalization, in which the constitution empowers the jurists to specify the content of Islamic law and its interpretation directly, and gives their views priority over political or judicial processes. Here, the government derives its very authority from religious texts, and so vests ultimate interpretation in the hands of religiously oriented jurists. At the other extreme is delegated constitutionalization, in which the constitution specifies that Islamic law will remain uncoded, to be determined by jurists in *shari'a* courts. Ostensibly, the government maintains control over these courts. But when it staffs them with jurists to whom it delegates authority not only to evaluate Islamic legal matters, but also to legislate them, it too vests ultimate interpretation in the hands of the jurists. For both of these extremes, the Fourth Branch remains unchecked except within the confines of the community of jurists itself. In the middle is a type of constitutionalization that may be called coordinate. Here, the government seeks to maintain a system of checks-and-balances and separation-of-powers familiar to many modern democracies. The head of state is to be popularly elected and control executive affairs, a popularly elected parliament is to exercise legislative authority, and state-appointed judges are to wield exclusive adjudicative authority. In practice, the Islamic law incorporation implies a merely consultative role for the jurists in the state institutions' law-making processes. As outlined below, the extent of, and mechanisms for, juristic involvement in each model vary.

I. Dominant Constitutionalization

The paradigmatic example of dominant constitutionalization of Islamic law is Iran.¹¹² Iran's Constitution designates Shī'ism as the official religion,¹¹³ makes Islamic criteria the basis for all legislation,¹¹⁴ and includes an Islamic law non-contradiction clause.¹¹⁵ Thus, structurally, the Constitution ensures that jurists will dominate each governmental branch.

As for the legislature, a body called the Guardian Council makes determinations of each law's compliance with Islamic legal rules through an automatic right to review all legislation.¹¹⁶ Members of this body may also guide legislation by attending parliamentary sessions and commenting on draft laws as they are debated.¹¹⁷ The Council comprises six jurists and six legal experts, all of whom are elected by Parliament from amongst the Muslim jurists screened by the Supreme Judicial Council and nominated by the Head of the Judicial Power.¹¹⁸ Members of the Supreme Judicial Council are classi-

112 Islamic elements appear in 125 articles of the Iranian Constitution. See ASGHAR SCHIRAZI, *THE CONSTITUTION OF IRAN: POLITICS AND THE STATE IN THE ISLAMIC REPUBLIC* 8 (1997).

113 1980 *Qānūn-i Asāsī-yi Jumhūrī-yi Islāmī-yi Irān* [Basic Law of the Islamic Republic of Iran (as amended)] arts. 12–14. The constitution permits minority (Sunnī) Islamic schools to act in accord with their own laws for religious rites, personal status, and related litigation in the courts, *id.* art. 12, accords similar confessional deference to designated non-Muslim religious minorities, *id.* art. 13, and “tolerates” non-Muslims, *id.* art. 14.

114 *Id.* art. 4 (“All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria [*maḡāzīn-i Islām*].”).

115 *Id.* art. 72 (“The Islamic Consultative Assembly [Parliament] cannot enact laws contrary to the official religion of the country or to the Constitution. It is the duty of the Guardian Council to determine whether a violation has occurred, in accordance with Article 96.”).

116 *Id.* art. 96 (“The majority of jurists (3) of the Guardian Council shall decide whether or not the legislation passed by the Parliament is in conformity with Islam’s [legal] rulings (*ahkām-i Islām*)”); *id.* art. 98 (“The interpretation of the Constitution shall be the responsibility of the Guardian Council”); *id.* art. 94 (“All enactments of the Parliament shall be submitted to the Guardian Council and the Council shall examine them within ten days after the receipt thereof to see whether or not they reconcile with the tenets of Islam and constitutional law. If the Guardian Council finds the enactments contrary to Islamic tenets and constitutional law, it shall return them to Parliament for reconsideration.”); *cf.* MALLAT, *supra* note 41, at 80–81 (noting the incomparably expansive powers of this state council when compared to the review functions of State Councils in France and Germany).

117 1980 *Qānūn-i Asāsī-yi Jumhūrī-yi Islāmī-yi Irān* [Basic Law of the Islamic Republic of Iran (as amended)] arts. 95–98 (detailing the Guardian Council’s powers of review, attendance, and approval); *cf.* MALLAT, *supra* note 41, at 82 (describing the likely composition of the Council).

118 1980 *Qānūn-i Asāsī-yi Jumhūrī-yi Islāmī-yi Irān* [Basic Law of the Islamic Republic of Iran (as amended)] art. 91 (defining jurists as *fuqahā*, legal experts as *ḥuqūqḍān*).

cally trained jurists,¹¹⁹ and its Head is selected by the Supreme Leader, who is himself a classically trained jurist.¹²⁰ Thus the Guardian Council, despite its formal attachment to the legislature, is dominated by a judiciary made up of classically trained jurists who ensure the prominence of like-minded jurists on the Council.¹²¹ All this results in what has been termed an inevitable "institutionalized juristic quality of the Council of the Guardians."¹²²

Iraq's Islamic law constitutionalization is very different from Iran's. Structurally, Iraq neither incorporates the jurists into the governmental structure directly, nor does it specify the criteria for their training or orientation, as Iran does through the Guardianship of the Jurists doctrine. By equating Islamic norms with democratic and human rights norms, the Iraqi Constitution implicitly requires that any role the government subsequently specifies for jurists in the determinations over Islamic law should be coordinate, as described below. Kristen Stilt has pointed out that the Iranian model is an inapposite comparison for other reasons as well: leading Shī'ī clerics reject the Khomeini formulation of the Guardianship of the Jurists doctrine, many Shī'īs in the lay population are critical of Iran with the experience of hindsight, and the Iraqi population is more religiously diverse than that of Iran—with a mix of Shī'īs, Sunnīs and other substantial minorities.¹²³

2. Delegated Constitutionalization

Examples of delegated constitutionalization include many of the Gulf countries: Bahrain (Shī'ī majority, Shāfi'ī and Mālikī minority), the United Arab Emirates (Sunnī majority, Shī'ī minority), Qatar (Ḥanbalī majority), Oman (Ibādī majority), and Saudi Arabia (Ḥanbalī majority).¹²⁴ These countries have no codified family law,

119 *Id.* art. 162 (mandating that the Chief of the Supreme Court and the Prosecutor-General be "just honorable men well versed in judicial matters"); *cf.* MALLAT, *supra* note 41, at 82 (arguing that the Council will be dominated by classically trained jurists).

120 1980 *Qānūn-i Asāsi-yi Jumhūrī-yi Islāmī-yi Īrān* [Basic Law of the Islamic Republic of Iran (as amended)] arts. 109–110 (setting out the qualifications and duties of the Supreme Leader).

121 MALLAT, *supra* note 41, at 82 (describing the comprehensive authority of the Supreme Judicial Council over selection of Guardian Council members).

122 *Id.* at 82.

123 See Stilt, *supra* note 22, at 719. For further background on Shī'ī differences regarding the Guardianship of the Jurists doctrine during its formative stages in Iraq, see MALLAT, *supra* note 41, at 59–78; SCHIRAZI, *supra* note 112, at 45–58.

124 Countries that do not incorporate Islamic law through the constitution, but that do apply Islamic law to Muslims, also fall within the full judicialization framework. Examples in-

and instead direct judges to impose classical Islamic law according to the schools that the citizens follow. Ostensibly, judges who are non-specialists in Islamic law render decisions according to juristic formulations as found in classical written texts and/or summarized for easy consumption in the modern period. This arrangement results in a formally narrow scope of discretion (restricted to the scope of classical Islamic law for particular legal schools) that is very broad in practice (from the indeterminacy of that law). Critics complain that judges use this broad interpretive discretion to issue rulings unfavorable to women in areas of family law.¹²⁵ This is no doubt exacerbated by the fact that most judges and jurists in the Gulf follow a conservative brand of Islamic law with governmental support. Without codification, Islamic family law has no popular legislative origin, and with full judicialization of its content, there is no review. As discussed above concerning the attempts to de-codify Iraqi family law, this constitutional scheme differs markedly from that of Iraq.¹²⁶

3. *Coordinate Constitutionalization*

Other Islamic constitutional systems that are more attentive to the demands of procedural democracy have codified family law codes and seek to incorporate Islamic law through the political process, the judicial process, or some combination of both. In political terms, the contribution of jurists occurs at the stage of a law's formation in the legislature, while in judicial terms, the contribution is at the stage of judicial review. The following two examples of Egypt and Morocco illustrate these differences, showing how the government's relationship with the jurists may be formal or informal, amicable or strained. In Egypt (a purportedly constitutional, presidential democracy), governmental-juristic relations are strained and informal, with most family law developments occurring at the judicial level; in Morocco (a purportedly constitutional, democratic monarchy) they are amicable

clude many African countries like Nigeria (Mālikī) and the Gambia (Mālikī), as well as Israel (Hanafi).

¹²⁵ See, e.g., *Bahrain: Controversy over Reform for Family Law*, ARAB REFORM BULL. (Carnegie Endowment for Int'l Peace, Wash. D.C.), Nov. 2005, at 8, http://www.carnegieendowment.org/files/fullissue_nov055.pdf (noting efforts to reform family law in Bahrain through a push for codification).

¹²⁶ See the discussion on codification and the failed attempt to de-codify family law through Resolution 137, *supra* notes 67–75 and accompanying text (distinguishing the Iraqi system from Gulf-style uncoded systems).

and sometimes formal, as in the case of its recent family law reforms.¹²⁷

a. Judicialization

The Egyptian legal system is an example of a system that functions under a regime of judicialization,¹²⁸ directing the courts to resolve disputes over textual interpretation of codified Islamic personal status laws.¹²⁹ In Egypt, judges rule on the basis of secular standards, and only when required to draw upon Islamic law as a residual source do they consider consulting the jurists.¹³⁰ This arrangement excludes the jurists. Judges are concerned with judicial independence and autonomy, and their desire to avoid resorting to the jurists becomes problematic when it creates incentives to apply a form of classical Islamic family law; they maintain that the law is unambiguous, and thus there is no need to consult the jurists formally.¹³¹ A further problem is that the Egyptian judiciary—one of the more independent in the region—functions under the auspices of and in support of a strong executive that controls larger constitutional questions, such as the scope of Islamic law and the function of democracy. The judiciary self-consciously limits its own power out of deference to a strong and in-

127 There are many other examples that suggest similarities between the Moroccan and Egyptian models, but these two suffice to give an overall view of family law in Islamic constitutional democracies. Egypt is the model of law in the Arab world, its laws having greatly influenced the formation of the laws of other countries in the region with its modern developments providing a reference point for other countries. See generally NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* 63 (1997) (discussing the changes made to the Egyptian court system in the 1950s). Morocco is notable for its recent legal reforms and their positive reception in the local and international communities.

128 On the judicialization of politics as a global trend, see Ran Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J.L. & JURIS. 191, 197 (2002) (reviewing the role of courts in various countries' political developments).

129 For a description of how this process works, see Stilt, *supra* note 22, at 722–39, which describes the general narrowing of influence of the *Shari'a* on the law, though it remains the guiding force—whether codified or uncoded—in personal status laws, which include family-related issues.

130 *Id.* at 730 (“[T]he *Shari'a* is a residual source of law to be used by a judge if the Civil Code is silent on a particular issue.”).

131 See Stilt, *supra* note 22, at 727 (noting that Egypt’s Supreme Constitutional Court “has on several occasions upheld legislation from an Article 2 challenge and, while explaining why the particular law does not violate the clear meaning of a Qur’anic provision, has mentioned as dicta propositions that the SCC does consider definite in terms of meaning and authenticity” (citing Frank E. Vogel, *Conformity with Islamic Shari’a and Constitutionality Under Article 2: Some Issues of Theory, Practice, and Comparison*, in *DEMOCRACY, THE RULE OF LAW AND ISLAM* 527, 541–42 (Eugene Cotran & Adel Omar Sherif eds., 1999))).

trusive state, and it prefers deference to the executive over deference to the jurists.¹³² The ironic, and perhaps unintended, consequence of an independent judiciary and a strong executive that excludes juristic input is a self-imposed restriction on reform in the courts.¹³³ This may have a trickle-up effect to the legislature; absent lower-court disputes, the legislature has little internal reason or justification to resolve judicial disputes or to create sweeping reforms with respect to possible developments in juristic interpretations of Islamic family law.¹³⁴ That impetus would have to come from elsewhere.

b. Political Process

The Moroccan system is an example of a regime of greater politicization. There, the government consulted the jurists in the process of reformulating the country's personal status laws. To be sure, courts will have to resolve subsequent interpretive issues, but after the governmental-juristic coordinate political process of articulating Islamic family law, courts will have received more express guidance for doing so within the confines of Islamic legal precepts. Moreover, a political process that orients itself toward juristic inclusion may stymie

132 See BROWN, *supra* note 127, at 63 (noting that the transplant of the French legal codes was not merely the result of France's colonial enterprise, but a result of Egyptian legal reformer Sanhūrī and the judges' self-conscious attempt to limit their own authority in order to provide support for the officially sanctioned order: a strong and intrusive state that would withstand internal and external pressures).

133 But see Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043 (2004) (arguing that judges defer to jurists in a way that constrains the law and that reform from within the religious framework is an untenable proposition due to the limits imposed by classical formulations of Islamic law that reflect a pre-modern patriarchal system). Abu-Odeh suggests that for true reform to occur, family law should be fully secularized. Her analysis reflects a view that Islamic law is composed of substantive legal rules only, rather than substance and procedures for interpretation that may allow jurists to accommodate modern non-patriarchal sentiments. It also suggests that the rigidity of Islamic law that belies reform in the Egyptian context is unrelated to the judicialization of Islamic law.

134 Cf. Hirschl, *supra* note 128, at 214–15 (arguing that judicialization makes politicians abandon the deliberative process in favor of policy preferences, constitutes either the judicial flouting of legislative supremacy or legislative abdication of responsibility, and—inasmuch as the judiciary sets values rather than resolves disputes—makes judicial review difficult to justify by the theory of the judiciary as the “Least Dangerous Branch”). In effect, Hirschl's argument suggests that attempts to overcome the counter-majoritarian difficulty that attach to judicial review, like those of Alexander Bickel or John Hart Ely, simply do not apply in Islamic constitutional contexts in which the by-product of excluding the Fourth Branch is that the judiciary has been made too strong. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

constitutional litigation concerning Islamic law (based on the non-contradiction clause) and may suggest mechanisms for continuing reform if jurists update the law.¹³⁵ That is, if the government continuously includes jurists in the political process, it heightens the chances that legislative acts will meet constitutional requirements of adherence to Islamic legal norms as well as to liberal democratic and human rights norms.

Iraq's recent experiences with Resolution 137 already parallel the element of popular involvement in Morocco's pre-reform process, which eventually elicited a governmental response to both popular and juristic concerns. Inasmuch as the Moroccan reforms reflect more mature developments in the line of popular and juristic involvement in legal interpretation and articulation, it is useful to take a closer look at the Moroccan political process and the substance of its reforms.

IV. ALL THE KING'S MEN: GOVERNMENT AND JURISTS IN MOROCCAN REFORMS

Morocco recently passed sweeping reforms to its existing personal status laws¹³⁶ through a process that self-consciously sought to harmonize democratic and human rights norms with Islamic legal norms.¹³⁷

135 There is of course the argument that juristic legal updating has stagnated, and this is part of the problem with Islamic law in the modern age. See, e.g., HALLAQ, *supra* note 6, at 21. As Hallaq points out, such stagnation is a symptom of recent historical contingencies, rather than an element intrinsic to Islamic law. As discussed below, in the Moroccan case, it does not take into account new pressures for updating Islamic law within the changing face of the Muslim world, in terms of literacy, geo-politics, and popular agitation for reform.

136 The pre-existing code of personal status was issued in 1956 following independence from France. *Mudawwanat al-aḥwāl al-shakhṣiyya* [Personal Status Code] (1956); see ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESEOURCE BOOK 179 (Abdullahi An-Na'im ed., 2002) [hereinafter ISLAMIC FAMILY LAW RESOURCE BOOK]. Before that, uncodified, informal Islamic law and customary law governed family law. That law was based on mainstream settled Mālikī substantive rules and incorporated some provisions from other schools along with legislation from neighboring countries.

137 *Mudawwanat al-usra* [Family Code] pmb. para. 4 (2004) (Morocco), available at the Official Website of the Moroccan Justice Department, <http://www.justice.gov.ma>, English translation (unofficial), available at <http://friendsofmorocco.org/Family%20Code.htm> (last viewed Dec. 25, 2006) (noting that King Muḥammad VI directed the Royal Commission to give attention to the dictates of Islamic law as well as internationally recognized human rights). Despite the King's assertion that the Code was written all "in accordance with certain provisions of the Mālikī School," *id.* pmb. it, too, draws on other schools. For example, its provisions have no guardian requirement for a woman entering into a first-time marriage, in accordance with Ḥanafī and Shī'ī law, and inserts the requirement from Shī'ī law of witnesses to perfect a divorce; neither of these are mainstream Mālikī positions.

The new Moroccan Family Code,¹³⁸ like the old, centers on settled rules of Mālikī law, but it includes non-Mālikī provisions and was drafted—according to the King—with a purposive approach designed to underscore values of equality, tolerance, and fairness.¹³⁹ The resulting Code contains several substantive changes¹⁴⁰ for which women's groups, international NGOs, and others have praised it as an example of “progressive” personal status laws within an Islamic framework.¹⁴¹

Whether Morocco's Code is indeed “progressive,” by whatever standard one would measure the term, is not the central point of this discussion concerning Islamic constitutionalism. We can assume some satisfaction amongst Moroccans with the mostly positive domestic response.

This is confirmed by Aoubakr Jamaï, Moroccan journalist and editor, who interviewed some of the legislators and jurists who sat on the reform commission. Personal Communication with Aoubakr Jamaï, Publisher, *Le Journal Hebdomadaire* (Jan. 23, 2006).

138 *Mudawwanat al-usra* [Family Code] pmbl. para. 4 (Morocco).

139 *See id.* pmbl. paras. 4–5 (stressing the values placed on *ijtihād* (juridical reasoning)).

140 The Code reforms several of the most contentious issues for Islamic family law in the modern day, the four main areas covering marriage, divorce, child custody, and inheritance. The changes to marriage and divorce regulations are most extensive. For example, the new Code replaced the minimum marriage age for females (which was fifteen for females and eighteen for males) with a minimum age of eighteen for both genders, *id.* art. 19, yet permits the judge to reduce this age in certain justified cases, *id.* art. 20. As noted, it also does away with the mandatory guardianship requirement entirely. *Id.* arts. 24–25 (“marital tutelage is the woman's right.”). It limits polygamy without banning it totally. *Id.* pmbl.; *id.* arts. 40–42. It disposes of the Mālikī-specific version of a wifely duty to obey her husband, replacing it with a scheme of mutual rights and duties between spouses. *Id.* arts. 26–29, 51, 168, 194–196. Finally, it places the overall institution of “private” marriage and its dissolution within the framework of the state and its legal institutions—requiring divorce to occur within, and be registered by, the courts, *id.* arts. 78–79, 124, restricting the man's typical prerogative under classical Islamic law to initiate divorce, *id.* arts. 90, 91–93, and granting women new rights of divorce-initiation, *id.* arts. 89, 96, 98, 114–115.

141 Some Moroccan organizations and parties include, among others, L'Association démocratique des Femmes du Maroc (Moroccan feminist organization), Hizb al-'adl wa al-ihsān (Islamist political party), Jamā'at al-'Adl wa al-Ihsān (Islamist foundation that is the non-political counterpart to the political party), and Priteps de l'Égalité (Moroccan human rights organization instrumental in bringing about the reforms). For descriptions of many of these groups and their reactions, see Wendy Kristianasen, *Islam's Women Fight for Their Rights*, LE MONDE DIPLOMATIQUE, Apr. 2004, <http://mondediplo.com/2004/04/02islamicwomen>. Organizations outside of Morocco include Vital Voices (U.S.-based women's rights group), <http://www.vitalvoices.org> (last viewed Jan. 3, 2006), and The Clinton Foundation, <http://www.clintonglobalinitiative.org> (last viewed Dec. 24, 2006). The Code has been criticized as well. *See, e.g.,* Jamila Bargach, *An Ambiguous Discourse of Rights: The 2004 Family Law Reform in Morocco*, 3 HAWWA 245, 261–63 (2005) (criticizing the Code's failure to protect the rights of mothers who have children out of wedlock and children who are born out of wedlock).

Rather, the contribution that the Moroccan experiment can provide to considerations of Islamic constitutionalism is to underscore the paramount importance of the *process* by which Islamic legal reform was carried out to the broad satisfaction of the people. The unique maneuver here was the King's establishment of a commission to propose legislative reforms, which comprised both jurists and Members of Parliament.

Morocco's recent history in the area of Islamic family law illuminates how this scheme came about. In 1992, the Moroccan NGO Union de l'Action Feminine (UAF) gathered one million signatures from men and women in favor of certain reforms in personal status laws.¹⁴² In 1993, the Parliament amended the law in various ways.¹⁴³ But the changes did not go far enough and UAF continued to rally governmental and popular support from the King, Parliament Members, imams, lawyers, the media, and the Moroccan citizenry at large.¹⁴⁴ As these debates played out in Parliament and on the streets, government reformists argued back and forth with Islamists and jurist-backed opposition over the nature of reforms. The jurists criticized the government secularists' proposed project of "Integrating Women in Economic Development" because, in their view, the project did not relate to Islamic legal norms.¹⁴⁵ The jurists viewed the project as a threat to the country's Islamic identity and turned the conflict into a debate over the role of Islamic law in legislation.¹⁴⁶ As is common in debates about the rule of Islamic law, the conflict turned into one of identity politics.

When viewed against the outcome of the recent reforms, clearly, a key issue in the debate was whether and what role the jurists would play in the reforms. The disputes over the proposed reforms came to a head on the street. In the spring of 2000, over 300,000 demonstrators supported the secular reform proposal ("Integrating Women in Economic Development") at a rally in Rabat.¹⁴⁷ At the same time, a comparable number protested the proposal as a deviation from

142 Clinton Global Initiative, Fueling Reform: Moroccan Family Law as a Model-in-Action 2005 (Commitment Announcement), <http://commitments.clintonglobalinitiative.org/projects.htm?mode=view&rid=43241> (last viewed Feb. 29, 2008) [hereinafter Fueling Reform].

143 See ISLAMIC FAMILY LAW RESOURCE BOOK, *supra* note 136, at 179 (describing the amendments).

144 Fueling Reform, *supra* note 142.

145 Bargach, *supra* note 141, at 253.

146 *Id.*

147 Hajjar, *supra* note 60, at 233.

proper Islamic legal norms.¹⁴⁸ In so doing, they demonstrated, for the first time, the massive force of the Islamist and juristic elements in Morocco and of the legitimizing effect of asserting an Islamic *legal* identity.¹⁴⁹ Something had to be done.

The King intervened, seeking to ameliorate the tensions in a way that would attend to the concerns of both the secularists and the Islamists. In April 2001, he halted the purely secular governmental reform projects and convened a reform commission with a mandate to resolve the secularist-Islamist/juristic differences and propose mutually agreeable reforms for personal status laws.¹⁵⁰ He appointed a cross section of committee members drawn from groups of men and women with expertise that ranged from the political (lobbyists, politicians, and women's rights activists from the Printemps de l'Égalité NGO umbrella group) to the scholarly (including jurists—both men and women—who were traditionally trained at the Qarawiyyīn *madrasa* in Fez).¹⁵¹ Two-and-a-half years later, the Committee finished its work. On October 10, 2003, the King announced the family law reform proposal and introduced it to Parliament for consideration.¹⁵² On January 25, 2004, the Moroccan National Assembly adopted the bill with minor revisions.¹⁵³

Though the Committee did not explicitly disclose their interpretive deliberations, the King's introductory remarks accompanying the Code and certain features of the Code itself suggest particular interpretive methods that the Committee may have employed. Regardless of whether Islamic law was their starting point, the extent to which the Commission couched reforms in the language of Islamic law is notable. In large part, the Code reads like a family law chapter from a classical law compendium, systematically listing each topic roughly in the same order as do classical works of *fiqh*. Symbolically, this signals an attempt to couch the reforms in terms of classical Islamic law and to avoid a method of legal reform (common elsewhere in the Middle East) that adopts Western templates of law upon which a ve-

148 *Id.*

149 Bargach, *supra* note 141, at 253.

150 *Id.*

151 *Id.* at 253 n.12 and accompanying text; see also Women's Learning Partnership for Rights, Development, and Peace, Morocco Adopts Landmark Family Law Supporting Women's Equality, Feb. 24, 2004, <http://www.learningpartnership.org/en/advocacy/alerts/morocco0204> (describing the process of adopting the new family law).

152 Zineb Touimi-Benjelloun, *A New Family Law in Morocco: "Patience Is Bitter, but Its Fruit Is Sweet,"* UN DEV. FUND FOR WOMEN, Dec. 19, 2003, http://www.unifem.org/gender_issues/voices_from_the_field/story.php?StoryID=264.

153 Women's Learning Partnership for Rights, Development, and Peace, *supra* note 151.

neer of Islamic legal language is placed.¹⁵⁴ Instead, the Committee's interpretive strategies center around five approaches that mix classical Islamic and modern democratic norms: reinterpreting key Qur'ānic verses and *ḥadīth*, applying universal legal maxims that reflect the spirit of Islamic law,¹⁵⁵ adopting minority Mālikī opinions along with rules from other legal schools, re-categorizing certain *fiqh* provisions to create new rights and legal remedies for women, and overlaying Islamic provisions with state institutional and international norms, especially in areas where Islamic law is silent.¹⁵⁶

Although Morocco does not offer an exact parallel to Iraq, it is useful in the discussion of actual institutional arrangements under a regime of coordinate Islamic constitutionalism. Morocco differs from Iraq in that it is a monarchic democracy rather than a presidential one; its Muslim population is majority Sunnī with a Shī'ī minority rather than majority Shī'ī with a Sunnī minority; and it follows the Mālikī school of the African-Islamic tradition rather than the Shī'ī or Ḥanafī traditions of Iraq.¹⁵⁷ Nevertheless, its experiment is instructive for understanding new issues of Islamic constitutionalism inasmuch

154 An example is the Tunisian summary excision of polygamy from its law books. Note that the Committee's reticence to invalidate polygamy summarily, *see supra* note 140, does not necessarily signal its comfort with the practice. Rather, they seem to heed the notion that following a methodology and speaking in terms of Islamic law provides the best means of successful and lasting reform, and thereby may be exportable to countries committed to applying some form of Islamic law in the context of Islamic constitutionalism. According to some traditionally trained expert jurists, there are some legal bases for prohibition of polygamy outright that have been recently advanced, but the arguments in favor of that position have yet to gain traction in the grammar of Islamic law.

155 For instance, in expanding women's options to initiate divorce on the ground of harm inflicted by her spouse, it "endorse[s] the general legal principle [that a legal agent should] 'neither harm nor be harmed' to promote equality and equity between the two spouses." *Mudawwanat al-usra* [Family Code] pmb. (2004) (Morocco); *id.* art. 89. The quoted language is one of five universal Islamic legal maxims. Another example is the Code's changes to certain marriage guidelines for residents abroad to facilitate recognition of those marriages in Moroccan courts. *Id.* This is based on the maxim that "hardship brings about facilitation." For a discussion of these and other Islamic universal legal maxims, see generally Wolfhart Heinrichs, *Qawā'id as a Genre of Legal Literature*, in *STUDIES IN ISLAMIC LEGAL THEORY* 365 (Bernard G. Weiss ed., 2002).

156 The Code distinguishes between principles derived from Islamic law (by use of the term *shar'ī*) from principles that issue from state law (by use of the term *qānūnī*) in order to clarify areas where the basis of the law is secular (i.e., fact-based or contingent and therefore not within the full jurisdiction of Islamic law) and thereby justify arbitrary stipulations. For example, it uses the "state" age of legal majority to set the age of majority at eighteen for both genders. *Mudawwanat al-usra* [Family Code] art. 19. (Morocco).

157 One objection to the view of Morocco as a model is that the charismatic monarch there makes all the difference in driving legal change. Yet this feature of the Moroccan system is one means that the different branches are forced to coordinate; arguably it is not the only means.

as it offers insight into the workings of a coordinate model of constitutionalization that has been acclaimed a success both domestically and internationally.

V. CONCLUSIONS

Islamic law is a complex legal system, and its incorporation into modern state structures demands a unique institutional arrangement for interpreting the law. Once a constitution has declared Islamic law to be a source of legislation or enshrines an Islamic law non-contradiction clause, political leaders and other interested actors determine how legal processes will play out. Central issues include the scope of consideration afforded Islamic law in the constitutional incorporation, the nature and substance of the law in the context of Islamic constitutionalism, and the governmental decision-makers in the realm of legislation and adjudication vis-à-vis the jurists who typically are popularly recognized as the historically competent interpreters of Islamic law.

A useful analysis of Islamic constitutionalism moves beyond the question of whether Islam and democracy are compatible, or whether Islamic law is compatible with democratic notions concerning the rule of law. Theoretical proposals and historical trends suggest that they are, and for three reasons, pragmatic concerns require modes of discussing *how* they are. First, Islamic constitutionalism inevitably contemplates some role for the jurists, as historically they have enjoyed the epistemic authority and training that grants them legitimacy and competence to interpret Islamic law or approve Islamic legal interpretations. The Constitution brings the positivist rule of recognition to bear in full force with reference to Islamic legal norms. Second, jurists are individual or corporate members of a democratic polity whose voices play a role in democratic participation. In some sense, they too form a part of "We the People," inasmuch as their corporate members appeal to them and defer to their decisions. Finally, the juristic class is often a central component to Islamic law and practice, and to legal reform as well perhaps, because of a significant amount of popular legitimacy. Jurists themselves often assert a right to play a role in, or at least monitor, Islamic legal interpretation that, with their popular support, it has been politically difficult for governments to deny. All these factors indicate that jurists comprise a type of Fourth Branch to an Islamic constitutional government; that is, their very presence coupled with a constitutional clause incorporating Islamic law demands the constitutionally constructed three branches to negotiate a certain relationship with them. This relation-

ship ranges from exclusion to dominance, and in its best iterations, it is coordinate. In short, it is an unavoidable conclusion that by the terms of Islamic constitutional clauses and related political theories, jurists matter for law and governance in Islamic constitutional regimes like Iraq. With this in mind, contemplating Islamic constitutionalism requires attention to the jurists and their interpretive methods.

In addition, recent history suggests at least two ways in which the exclusion of jurists may be harmful. First, exclusion typically brings about opposition that tends to foment fundamentalism in the name of a return to Islamic legitimacy. Here, identity politics may proliferate in the form of suppressed sentiments amongst a population quelled by a strong government and weak democratic institutions that fail to protect individual rights; it may create violent unrest. Or, if fundamentalist proponents of Islamic law manage to gain power, it may emerge in the form of Islamic law that is imposed from the top down, without any power-sharing or checks and balances at all. This latter scenario describes countries where there is formal constitutionalization of Islamic law but weak democratic structures.

Second, exclusion actually may prevent political and judicial reform. This possibility describes countries where there is either informal or coordinate constitutionalization of Islamic law, but where judges who have no Islamic law expertise have been empowered to interpret the law without adequate interpretive tools for doing so. In such cases, they tend to crystalize the law without attempting jurisprudential methods to reform it, and exclude the jurists equipped to do so (if they are so inclined—which is, admittedly, quite another question.) In other words, judges, if not the institutional arrangement itself, bind their own hands. In such situations, the state has constitutionalized Islamic law, but the institutional arrangement has removed legitimate methods for its dynamic growth or reform by excluding Islamic law experts from the interpretive project. To preserve a strong executive and an independent judiciary, judges, politicians, and the executive alike in such systems support this arrangement and thereby squeeze out popular calls for change. In short, the judicialization of Islamic law without professional juristic expertise prevents, rather than encourages, legal reform on Islamic grounds.

For democratic and rights interests, the best outcomes in Islamic constitutionalism seem to emerge when the government acknowledges the presence of the jurists and sets up an institutional arrangement whereby it works with them in a coordinate fashion. Do-

ing so places control over law in the democratic sovereign, complete with checks and balances, and encourages the popular sentiments of “We the People” to balance against the expertise of “We the Jurists.” While it has several differences from the Iraqi situation, Morocco and its recent family law reforms at least can be seen as an example of this trend. Each Islamic constitutional country will be different in the way that it negotiates this task along with the differences in the religio-political and demographic makeup, transnational influences, juristic interpretive methods, and institutional legacy that its jurists and citizenry bring to the table. Iraq—with its mixed Sunnī–Shī‘ī and non-Muslim population, together with its majority Shī‘ī jurists’ sturdy institutional presence and their strong living tradition of Islamic legal interpretation—will have to work out its own answers to Islamic constitutionalism’s four questions raised in this Article. As it does so, Iraq will no doubt carefully consider, in coordination with the juristic Fourth Branch, the institutional arrangement and the interpretive mandate for its government.